

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED

AUG 10 1973

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

LEROY LOETHER and MARIANE LOETHER, his wife,
and MRS. ANTHONY PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

JACK GREENBERG

MICHAEL DAVIDSON

SYLVIA DREW

ERIC SCHNAPPER

10 Columbus Circle

New York, N.Y. 10019

PATRICIA D. McMAHON

Freedom Through Equality, Inc.

152 West Wisconsin Avenue

Milwaukee, Wisconsin 53203

SEYMOUR PIKOFKY

Milwaukee Legal Services

2200 North Third St.

Milwaukee, Wisconsin 53212

Attorneys for Petitioner

CHARLES L. BLACK, JR.
Of Counsel

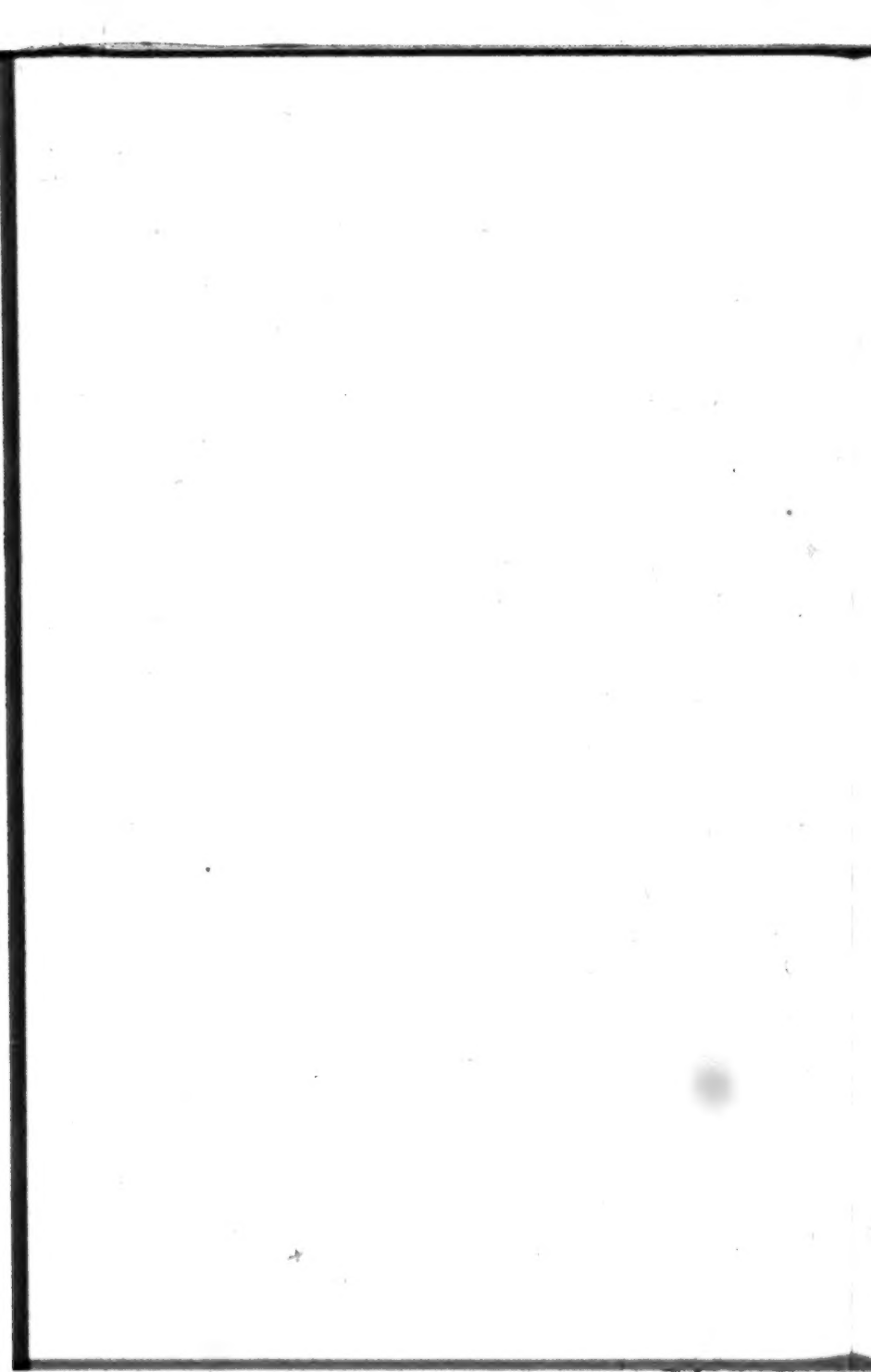


TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Summary of Argument	6
 I. Title VIII Provides That All Issues Shall Be Tried By a Judge Without a Jury	9
a. Statutory Language	9
b. Legislative History	15
c. Constitutional Consideration	19
 II. The Seventh Amendment Does Not Require Jury Trials in Actions Arising Under Title VIII	27
a. The Rights Protected by Title VIII Were Unknown At Common Law	27
b. The Relief Available in a Title VIII Case Is Part of a Single Integrated Equitable Remedy	36
c. A Court of Equity Could Constitutionally Award Legal Relief in This Case	39
 CONCLUSION	50

TABLE OF AUTHORITIES

<i>Cases:</i>	PAGE
Aladdin Mfg. Co. v. Mantle Lamp Co. of America, 116 F.2d 708 (7th Cir. 1941)	41
Alexander v. Hillman, 296 U.S. 222 (1935)	37
Allgeyer v. Louisiana, 165 U.S. 578 (1897)	30
Alpaugh v. Wolverton, 184 Va. 943, 36 S.E. 2d 906 (1946)	34
Alsberg v. Lucerne Hotel Co., 46 Misc. 617, 92 N.Y.S. 851 (1905)	30
Anthony v. Brooks, 67 LRRM 2897 (N.D. Ga. 1967)	15
Aquilines Inc. v. N.L.R.B., 87 F.2d 146 (5th Cir. 1936) ..	28
Banks v. Chicago Grain Trimmers Association, 390 U.S. 459	12
Banks v. Local 136, I.B.E.W., C.A. No. 67-598 (N.D. Ala., order dated January 25, 1968)	15
Beacon Theatres v. Westover, 359 U.S. 509 (1959) 8-9-10,	46
Beall v. Drane, 25 Ga. 430 (1857)	31
Bean v. Patterson, 122 U.S. 496 (1887)	30
Birdsall v. Coolidge, 93 U.S. 64 (1877)	41
Bloom v. Illinois, 391 U.S. 194 (1968)	18
Booth v. Illinois, 184 U.S. 425 (1902)	30
Brady v. T.W.A., Inc., 196 F. Supp. 504 (D. Del. 1961)	29, 41
Bridges v. Mendota Apartments, No. 898-H (D.C. Commission on Human Rights), EOH ¶ 17,505 (1972)	14
Brown Shoe Co. v. Hunt, 103 Iowa 586, 72 N.W. 765 (1897)	35
Bryson v. Bramlett, 204 Tenn. 347, 321 S.W.2d 555 (1958)	40
Burkhardt v. Lofton, 63 Cal. App.2d 230, 146 P.2d 720 (1944)	31
Busby v. Mitchell, 29 S.C. 447, 7 S.E. 618 (1888)	40

	PAGE
Calye's Case [1584], 8 Co. 322, 77 Eng. Rep. 520 (K.B.)	35
Camp v. Boyd, 229 U.S. 530 (1913)	40
Cates v. Allen, 149 U.S. 451 (1893)	45
Chandler v. Zeigler, 88 Col. 1, 291 P. 822 (1930)	31
Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F.2d 754 (M.D. Ala. 1959)	14, 39
Cheff v. Schnackenberg, 384 U.S. 373 (1966)	18
Christie v. York Corp., 1 D.L.R. 81 (1940)	35
City of Independence v. Richardson, 117 Kan. 656, 232 P. 1044 (1925)	34
Civil Rights Cases, 109 U.S. 3 (1883)	32, 35
Clark v. Wooster, 119 U.S. 322 (1886)	40
Coca-Cola Co. v. Dixi-Cola Laboratories, 155 F.2d 59, 64 (4th Cir.)	41
Colburn v. Simms [1843], 2 Hare 543, 67 Eng. Rep. 224 (Ch.)	40
Connecticut v. Seale (No. 15844, Dist. Ct. New Haven)	26
Constantine v. Imperial Hotels Ltd., 1 K.B. 693 (1944)	35
Cornish v. O'Donoghue, 30 F.2d 983 (D.C. Cir. 1929)	31
Corrigan v. Buckley, 299 F. 899 (D.C. Cir. 1924)	30
Corrigan v. Buckley, 271 U.S. 323 (1926)	32
Cox v. Babcock and Wilcox Company, 471 F.2d 13 (4th Cir. 1972)	16
Creedon v. Arielly, 8 F.R.D. 265 (W.D. N.Y. 1948)	29
Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1968)	15, 29, 38
Dairy Queen v. Wood, 369 U.S. 469 (1962)	46-47
Dansey v. Richardson [1854], 3 E. & B. 144 (Q.B.)	34
Day v. Woodworth, 54 U.S. (13 How.) 363 (1852)	41
Denton v. Stewart, 1 Cox Ch. 258, 29 Eng. Rep. 1156 (Ch. 1786)	42
DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908)	35

	PAGE
Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949)	30
Edwards v. Elliott, 88 U.S. 532 (1874)	14
Fay v. Pacific Improvements Co., 93 Cal. 253, 26 P. 1099 (1891)	34
Fell v. Knight [1841], 8 M. & W. 269 (Q.B.)	33
Fleming v. Peavy Wilson Lumber Co., 38 F. Supp. 1001 (W.D. La. 1941)	39
Franklin v. Evans, 55 O.L.R. 349 (1924)	35
Fraser v. McGibbon, 10 Ont. W.R. 54 (1907)	35
Gabrielson v. Hogan, 298 F. 722 (8th Cir. 1924)	42
Gillin v. Federal Paper Board Co., Inc., 52 F.R.D. 383 (D. Conn. 1970)	14
Goodyear Tire & Rubber Co. v. Altamont Springs Hotel, 206 Ky. 494, 267 S.W. 55 (1925)	34
Gormely v. Clark, 134 U.S. 338 (1890)	40
Gulbenkian v. Gulbenkian, 147 F.2d 173 (2d Cir. 1945)	42
Hale v. Allinsor, 188 U.S. 56 (1903)	45
Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970)	39
Hayes v. Seaboard Coast Line R.R. Co., 46 F.R.D. 49 (S.D. Ga. 1960)	14-15, 38
Heirn v. Bridault, 37 Miss. 209 (1859)	31
Hines v. Imperial Naval Store Co., 101 Miss. 802, 58 So. 650 (1911)	41
Hipp v. Babin, 60 U.S. 19 (1857)	44
Horner v. Harvey, 3 N.Mex. 307, 5 P. 329 (1885)	35
Hundley v. Milner Hotel Management Co., 114 F. Supp. 206 (W.D. Ky. 1953)	34

L.H.P. Corp. v. 210 Central Park South Corp., 228 N.Y.S.2d 883, 16 A.D.2d 461 (1962)	40
Imperial Shale Brick Co. v. Jewett, 169 N.Y. 143, 62 N.E. 167 (1901)	40
In Re Consolidated Properties, No. 228 (Ohio Civil Rights Commission), EOH ¶ 17,506 (1972)	14
International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963)	41
Jackson v. Concord Company, 45 N.J. 113, 253 A.2d 793 (1969)	14
Jacoby v. Wiggins, No. H-1582 (Pa. Human Relations Commission), EOH ¶ 17,502 (1972)	14
Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969)	14, 38
Johnson v. Georgia Highway Express, 47 F.R.D. 327 (N.D. Ga. 1968)	14
Jones v. Clifton, 101 U.S. 225 (1880)	30
Jones v. Mayer Co., 392 U.S. 409 (1968)	33, 36
Karns v. Allen, 135 Wis. 48, 115 N.W. 357 (1908)	40
Katchen v. Landy, 382 U.S. 323 (1966)	9, 48, 50
Keller Products, Inc. v. Rubber Linings Corp., 213 F.2d 382 (7th Cir. 1954)	41-42
Keltner v. Harris, 196 S.W. 1 (Mo. 1971)	30
Kennedy v. Lakso Co., 414 F.2d 1249 (3d Cir. 1969)	41
Kisten v. Hildebrand, 48 Ky. 72 (1848)	35
Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918)	30
Lawton v. Nightingale, 345 F. Supp. 683 (N.D. Ohio, 1972)	24
Le Blanc v. Southern Bell Telephone & Telegraph Co., 333 F. Supp. 602 (E.D. La. 1971)	37
Lea v. Cone Mills, C.A. No. C176-D-66 (N.D. N.C. order dated March 25, 1968)	15

	PAGE
Livingston v. Woodworth, 56 U.S. (15 How.) 546 (1854)	40
Lord v. Malakoff, No. H-71-0062 (Md. Commission on Human Relations), EOH ¶ 17,503 (1972)	14
Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596 (1919)	31
Lowry v. Whitaker Cable Corporation, 348 F. Supp. 202 (W.D. Mo. 1972)	14
Luria v. United States, 231 U.S. 9 (1913)	29
McElrath v. United States, 102 U.S. 426 (1880)	29
Malat v. Riddell, 383 U.S. 569 (1966)	12
Marbury v. Madison, 1 Cranch (U.S.) 137 (1803)	47
Marr v. Rife, Civ. No. 70-218 (S.D. Ohio, opinion dated August 31, 1972)	31
Middletown Bank v. Russ, 3 Conn. 135 (1819)	40
Mitchell v. De Mario Jewelry, 361 U.S. 288 (1960)	48
Mobile v. Kimball, 102 U.S. 691 (1881)	40
Moore v. Dempsey, 261 U.S. 86 (1923)	26
Moss v. Lane Company, 50 F.R.D. 122 (W.D. Va. 1970)	14
Moss v. Lane Company. 471 F.2d 853 (4th Cir. 1973)	16
Newman v. Piggie Park, 390 U.S. 400 (1968)	37
N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	13-14, 28
Northwest Airlines, Inc. v. Airline Pilots Assn., Intl., 373 F.2d 136 (8th Cir. 1967)	29
Oceanic Steam Navigation Co. v. Stranahon, 214 U.S. 320 (1909)	29
Ochoa v. American Oil Co., 338 F. Supp. 914 (S.D. Tex. 1972)	14
Osage Oil & Refining Co. v. Chandler, 287 F. 848 (2d Cir. 1923)	30

	PAGE
Parker v. Dee, 2 Ch. Cas. 200, 22 Eng. Rep. 910 (Ch. 1674)	40
Parker v. Flint, 12 Mod. Rep. 254 (1699)	35
Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922)	31
Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830)	27
Passavant v. United States, 148 U.S. 214 (1893)	29
Pease v. Rathbun-Jones Engineering Co., 243 U.S. 273 (1917)	40
People ex rel. Gaskill v. Forest Home Cemetery Co., 258 Ill. 36, 101 N.E. 219 (1913)	30
Porter v. Warner Holding Co., 328 U.S. 395 (1946)	39
Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915)	31
Randolph Laboratories, Inc. v. Specialties Development Corp., 213 F.2d 873 (3d Cir. 1954)	41
Rathbone v. Warren, 10 N.Y. 587 (1813)	40
Regina v. Rymer [1877], 2 Q.B.D. 136	33
Rex v. Ivens [1835], 7 C. & P. 213, 173 Eng. Rep. 94 (N.P.)	33-34
Rex v. Luellin [1700], 12 Mod.L.Rep. 445, 88 Eng. Rep. 141 (K.B.)	33, 35
Roberts v. Case Hotel Co., 106 Misc. 481. 175 N.Y.S. 123 (Sup. Ct. App. Term 1919)	35
Robins v. Grey [1895], 2 Q.B. 501	33
Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971)	14
Robinson v. Pauley, No. H 29-72 (W. Va. Human Rights Commission), EOH ¶ 17,504 (1972)	14
Rogers v. Clarence Hotel, 2 W.W.R. 545 (1940)	35
Root v. Railway Co., 105 U.S. 189 (1882)	41

	PAGE
Ross v. Bernhard, 396 U.S. 531 (1970)	45-46
Rutland Marble Co. v. Ripley, 77 U.S. (10 Wall.) 339 (1870)	38
Scott v. Neely, 140 U.S. 106 (1891)	45
Sealey v. Tandy [1902], 1 K.B. 296	34
Sexton v. Wheaton, 21 U.S. (8 Wheat.) 229 (1824)	30
Seymour v. McCormick, 57 U.S. (16 How.) 480 (1853)	41
Shearer v. Porter, 155 F.2d 77 (8th Cir. 1946)	42
Shelley v. Kraemer, 334 U.S. 1 (1948)	31
Shepherd v. Florida, 341 U.S. 50 (1951)	26
Shorter v. Shelton, 183 Va. 819, 33 S.E.2d 643 (1945)	34
Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966)	39
State v. Hicks, 174 N.C. 802, 93 S.E. 964 (1917)	35
State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890)	35
Stewart v. Griffith, 217 U.S. 323 (1910)	38
Stockton v. Russell, 54 F. 224, 228 (5th Cir. 1892)	39
Swofford v. B. & W. Inc., 336 F.2d 406 (5th Cir.), cert. denied 379 U.S. 962 (1964)	41
Swoll v. Oliver, 61 Ga. 248 (1878)	31
Taylor v. Ford Motor Co., 2 F.2d 473 (N.D. Ill. 1924)	41
Thompson v. Lacy [1820], 3 B. & Ald. 283, 106 Eng. Rep. 667 (K.B.)	33-34
Tilghman v. Proctor, 125 U.S. 136 (1888)	41
Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972)	36
Trop v. Dulles, 356 U.S. 86 (1958)	27
Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App.2d 170, 66 P.2d 1215 (1937)	41
United Cooperative Realty Co. v. Hawkins, 269 Ky. 563, 108 S.W.2d 507 (1937)	31

United States v. Ambac Industries, 15 F.R. Serv. 2d 607 (D. Mass. 1971)	14
United States v. Barnett, 376 U.S. 681 (1964)	25
United States v. Cooper Corporation, 312 U.S. 600 (1941)	11
United States v. Debs, 64 F. 724 (N.D. Ill. 1894)	39
United States v. Di Re, 332 U.S. 581 (1948)	27, 49
Welby v. John Duke, of Rutland [1773], 2 Brown C. & P. 39, 1 English Reports 778 (K.B.)	44
White v. White, 108 W. Va. 128, 150 S.E. 531 (1929)	31
Whitechurch v. Golding, 2 P. Wms. 541, 24 Eng. Rep. 852 (Ch. 1729)	40
Whitehead v. Shattuck, 138 U.S. 146 (1891)	44
Wickwire v. Reinecke, 275 U.S. 101 (1929)	29
Willard v. Taylor, 75 U.S. (8 Wal.) 557 (1870)	38
William Whitman Co. v. Universal Oil Products Co., 125 F. Supp. 137 (D. Del. 1954)	41
Williams v. Joyce, 4 Ore. App. 482, 479 P.2d 513 (1971)	14
Williams v. Travenol Laboratories, 344 F. Supp. 163 (N.D. Miss. 1972)	14
Wirtz v. Wheaton Glass Co., 253 F. Supp. 93 (D. N.J. 1966)	29
Wyatt v. Adair, 215 Ala. 363, 110 So. 801 (1926)	30
Yakus v. United States, 321 U.S. 414 (1944)	39

Statutes:

7 U.S.C. § 135g(b)	12, 13
7 U.S.C. § 136k	13
7 U.S.C. § 1595	13
9 U.S.C. § 4	11, 13

X

	PAGE
11 U.S.C. § 42	11, 13
18 U.S.C. § 3691	13
18 U.S.C. § 3692	13
19 U.S.C. § 1305	13
21 U.S.C. § 334(b)	13
21 U.S.C. § 882	13
21 U.S.C. § 1049	13
25 U.S.C. § 1302	13
28 U.S.C. § 384	45
28 U.S.C. § 959	13
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1343	21
28 U.S.C. § 1861	21
28 U.S.C. § 1866	12
28 U.S.C. § 1872	13
28 U.S.C. § 1873	13
28 U.S.C. § 1874	11
28 U.S.C. § 2402	13
29 U.S.C. § 151	28
39 U.S.C. § 840	13
42 U.S.C. § 1971	21
42 U.S.C. § 1973i	23
42 U.S.C. § 1975	21
42 U.S.C. § 1982	33

	PAGE
42 U.S.C. § 1983	24
42 U.S.C. § 1995	13, 17, 21-22
42 U.S.C. § 2000e-5	23
42 U.S.C. § 2000e(f)	14
42 U.S.C. § 2000h	23
42 U.S.C. § 3604(a)	2
42 U.S.C. § 3610	11, 13
42 U.S.C. § 3612	3, 10, 11, 36
42 U.S.C. § 3614	36, 50
42 U.S.C. § 3615	13
46 U.S.C. § 688	13
48 U.S.C. § 413	13
Emergency Price Control Act of 1942	29
Jury Selection and Service Act of 1968	12
Alaska Statutes, Title 18, § 22.10.020(c)	13
Ark. Stat. Ann. 671-1801 (Suppl. 1961)	36
California Civil Code § 35738(3)	13
General Statutes of Connecticut, § 53-36	13
Del. Code Ann., tit. 24, § 1501 (1953)	36
Del. Code Anno., § 4605(e)	13
Fla. Stat. Ann. § 509.092 (1961)	36
Hawaii Rev. Stat. § 515-13(b)(7)	13
Ind. Code § 22-9-6(k)(i)	13
Iowa Code § 105A.9(12)	13

	PAGE
Kan. Stat. Anno. § 44-1019	13
Ky. Rev. Stat. § 344.230	13
Anno. Code Md. Article 49B, § 14(e)	13
Anno. Laws of Mass., Ch. 151 B, § 5	13
Minn. Statutes, § 363.071(2)	13
Miss. Code Ann. § 2046.5 (1959)	36
N.H. Rev. Stat. Anno. § 354-A:9	13
N.J. Stat. Anno. § 10:5-17	13
New Mex. Stat. Anno. § 4-33-10 E	13
N.Y. Executive Law § 297(4)(c)	13
Ohio Rev. Code Anno., § 4112.05(g)	13
Ore. Rev. Stat. § 659-010-.110	14
Pa. Stat. Anno., Title 43, Ch. 17, § 959	13
General Laws of R.I. § 34-7-5(L)	13
S.D. Human Relations Act of 1972, L. 1972, S.B. 111, § 11(12)	13
Tenn. Code Ann. § 62-710 (1955)	36
Wash. Rev. Code § 49.60.225	13
W. Va. Code, § 5-11-10	13
Wisc. Stat. Anno. § 101.60	13
<i>Other Authorities:</i>	
Federal Rules of Civil Procedure	6, 8, 16, 40
H.R. 1507, 75th Cong. 2d Sess.	20
H.R. 4453, 81st Cong. 2d Sess.	20

	PAGE
H.R. 14765 89th Cong. 2d Sess.	12
S. 1358, 90th Cong. 1st Sess.	18
S. 3296, 89th Cong. 2d Sess.	15
Hearings Before a Subcommittee of the House Judiciary Committee, 89th Cong., 2d Sess. (1966)	12, 17-18
Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. (1966)	16-17-18
Hearing Before a Subcommittee of the Senate Banking and Currency Committee, 90th Cong., 1st Sess. (1967)	33
Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Banking and Currency Committee, 90th Cong., 1st Sess. (1967)	18, 49
82 Cong. Rec.	20
83 Cong. Rec.	21
96 Cong. Rec.	20-21
102 Cong. Rec.	21-22
103 Cong. Rec.	21-22, 26
106 Cong. Rec.	23
110 Cong. Rec.	23
111 Cong. Rec.	24
112 Cong. Rec.	15
114 Cong. Rec.	32
118 Cong. Rec.	24
Halsburg, Laws of England (2d ed. 1935)	33-34-35

	PAGE
James, Civil Procedure (1965)	40
Moore's Federal Practice	9, 12, 16
Pomeroy, Equity Jurisprudence (5th ed. 1941) ..	37, 40, 42
Story on Bailments (4th ed. 1866)	35
Story, Equity Jurisprudence (14th ed. 1918)	40
Garry, "Attacking Racism in Court Before Trial," Ginger, Minimizing Racism in Jury Trials (1969)	26
Hartman, "Racial and Religious Discrimination by Innkeepers in the U.S.A." 12 Mod. L. Rev. 449 (1950)	35
Developments in the Law, Employment Discrimina- tion and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109	25
Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167	25
Note, The Right to Nonjury Trial, 74 Harv. L. Rev. 1176 (1961)	25
Note, Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws, 69 Colum. L. Rev. 1019	25
Note, Hotel Law in Virginia, 38 Va. L. Rev. 815 (1952)	35
Note, An Innkeeper's 'Right' to Discriminate, 15 U. Fla. L. Rev. 109 (1962)	35

IN THE
Supreme Court of the United States

October Term, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

**LEBOY LOETHER and MARIANE LOETHER, his wife,
and Mrs. ANTHONY PEREZ**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court denying the demand for jury trial is reported at 312 F. Supp. 1008, and is set out in the Appendix (23a-28a). The opinion of the District Court awarding punitive damages is unreported, and is set out in the Appendix (47a-51a). The opinion of the Court of Appeals is reported at 467 F.2d 1110, and is set out in the Appendix (53a-73a).

Jurisdiction

The Court of Appeals entered judgment on September 29, 1972. On December 14, 1972, Mr. Justice Rehnquist extended the time for filing this petition to January 27, 1973. The petition was filed on January 26, 1973, and was granted on June 11, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether Title VIII of the 1968 Civil Rights Act or the Seventh Amendment provide a right to jury trial to a landlord in a civil action alleging that he refused to rent an apartment to plaintiff because of her race and seeking an injunction and punitive damages.

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment VII provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to rules of the common law.

2. Section 804(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a) provides:

As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale

or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

3. Section 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, provides:

(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 810(d) from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of

a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Statement of the Case

On November 7, 1969, plaintiff Julia Rogers commenced this action in United States District Court for the Eastern District of Wisconsin against Leroy and Mary Loether, white owners of an apartment in Milwaukee, and their agent Mrs. Anthony Perez. The complaint alleged the defendants had violated Section 804 of the Civil Rights Act of 1968 by refusing to rent an apartment to Mrs. Rogers because she is black. Plaintiff requested injunctive relief and \$1000 punitive damages but neither alleged nor sought actual damages (2a-6a). Jurisdiction of the District Court was based on Section 812 of the Act. After an evidentiary hearing on November 20, 1969, the court issued a preliminary injunction forbidding rental of the apartment pending final determination of the action (16a-17a). Defendants answered and demanded a jury trial of issues of fact.

Subsequent to the granting of the preliminary injunction, and at the urging of the District Court, repeated efforts were made to settle this matter by arranging for the plaintiff to move into the apartment at issue. Defendant Leroy Loether, however, adamantly refused to rent it to her. Finally, in April of 1970, five months after commencing this action, plaintiff was forced to lease a different apartment, and consented to the lifting of the preliminary injunction (47a).

On May 19, 1970, the District Court issued its opinion and order denying defendants' request for a jury trial (23a-28a). The District Court concluded that Title VIII of the Civil Rights Act of 1968 authorized the trial judge rather than a jury to assess damages, and that the court could exercise this equitable power consistent with the commands of the Seventh Amendment. The District Court awarded \$250 in punitive damages, but no costs, attorneys fees, or actual damages (47a-51a).

The Seventh Circuit reversed, holding that defendants' jury trial demand should have been granted. The court's opinion centered on its conclusion that an action to enforce Title VIII of the Civil Rights Act of 1968 is "in the nature of a suit at common law".

The court's extended constitutional analysis culminated in statutory interpretation. It found the district court's statutory analysis "persuasive but not compelling" and concluded that the statute "implies, without expressly stating, that a jury's participation is appropriate" when damages are sought. In the end the court viewed as "controlling" a canon of construction requiring the interpretation of statutes to avoid "grave doubts" of unconstitutionality and concluded that Title VIII of the Civil Rights Act of 1968 itself requires jury trials when damages are claimed.

Summary of Argument

I. a. The statutory language of Title VIII clearly contemplates that open housing cases arising thereunder shall be tried by a judge without a jury. Section 812(c) directs that "the court" may award damages and injunctive relief. The word "court" is used elsewhere in the statute where it can only refer to the judge, such as the provision in section 814 authorizing the court to expedite these cases. "The court" is used to denote the trial judge, as opposed to any jury, in the Federal Rules of Civil Procedure and numerous statutes. Congress must be presumed to have intended the "court" to have the same meaning throughout Title VIII, and to have the same meaning with which it was used by Congress elsewhere.

Had Congress desired to require a jury trial in these cases, it would have done so expressly, using the words "jury" or "jury trial", as it has in at least 22 other statutes.

b. At the 1966 Senate hearings on Title VIII, Attorney General Katzenbach expressly testified that Title VIII did not authorize jury trials. A committee member suggested amending the bill to provide juries as to some issues, but no such amendment was passed. The Attorney General's opposition to jury trials appears to have been based on his concern, expressed elsewhere in the hearings, that juries might refuse to enforce civil rights legislation.

As first proposed in 1966, Title VIII expressly provided for a jury trial in certain cases of criminal contempt. The different treatment of civil actions in the 1966 bill betokens a different intent on the part of the draftsmen.

c. Title VIII should not be interpreted as requiring jury trials merely to avoid possible doubts as to its validity under the Seventh Amendment, for there are equally im-

portant constitutional policies which might be adversely affected by such a statutory requirement.

For 35 years great concern has been expressed in Congress that juries, particularly in the South, would refuse to rule against white defendants in civil rights cases. Congressional proponents of civil rights legislation have consistently opposed jury trials in actions to enforce such statutes on the ground that hostile juries would nullify the proposed laws. Congress has granted a limited right to jury trial in contempt cases arising under some civil rights statutes, but has refused to do so for civil enforcement proceedings. A jury trial requirement in Title VIII cases might well defeat the statutory purpose of enforcing the Thirteenth and Fourteenth Amendments. Similarly, a jury hostile to blacks or open housing would be unlikely to afford an individual plaintiff her right to the fair hearing guaranteed by the Due Process clause of the Fifth Amendment.

Plaintiff does not maintain that these constitutional considerations could prevent a jury trial if a jury were otherwise required by the Seventh Amendment. But since there are constitutional policies militating both for and against jury trials, the statute should be given its plain meaning and its constitutionality under the Seventh Amendment directly faced and resolved.

II. a. There is no constitutional right to a jury trial in actions enforcing rights unknown at common law. This is such a case. At common law the owner of real property enjoyed unfettered discretion to refuse to sell or lease his property to any person for any reason. This discretion included the right to refuse to rent or lease property because of the race of the would-be tenant or buyer. Title VIII was enacted for the purpose of reversing this principle of common law.

The obligation of innkeepers at common law to serve all travellers seeking shelter is of no relevance here. That duty was limited to transients, not persons seeking permanent lodgings, and extended only to would-be guests who had no home near the inn. Moreover in the United States innkeepers were permitted to refuse to provide accommodations because of the race of a traveller.

b. The various forms of relief available in a Title VIII case are part of a single integrated equitable remedy. The statute contemplates that the judge will fashion a remedy in each case which will best promote the statutory policy of equal access to housing. The award of actual or punitive damages is discretionary, and in exercising that discretion the court may well consider whether injunctive relief has been awarded. Thus when, as here, actual or punitive damages are awarded, that relief is not damages as they were known at common law, but is part of an integrated equitable remedy awarded only after consideration of the availability and effectiveness of traditional equitable remedies.

c. Prior to the merger of law and equity by the Federal Rules of Civil Procedure, courts of equity had the unquestioned authority to award legal relief incidental to an equitable claim without recourse to a jury. Both actual and punitive damages were awarded in cases involving an equitable claim where resolution of these legal issues was essential to complete justice. This doctrine of equitable cleanup was applied even where, as in the instant case, the request for equitable relief was withdrawn or denied after the commencement of the action. Thus before the promulgation of the Federal Rules in 1938, this case would have been heard in equity and without a jury.

Since the merger of law and equity, this Court has expanded the right of jury trial in civil actions. *Beacon*

Theatres v. Westover, 359 U.S. 509 (1959). The meaning of the Seventh Amendment, however, was not changed by the Federal Rules. Rather, *Beacon Theatres* and its progeny apply an equitable practice, originating before the Seventh Amendment, of declining to assume jurisdiction over cases which could be adequately resolved at law so as to avoid unnecessarily impairing the rights available in legal proceedings. The instant case, however, involves a statutory requirement that Title VIII cases be tried to the court without a jury. In such a case, as in *Katchen v. Landy*, 382 U.S. 323 (1966), *Beacon Theatres* and its progeny are inapplicable and the law must be upheld unless it violates the Seventh Amendment itself. Since this case could have been heard in equity in 1791, the statute is constitutional.

I

Title VIII Provides That All Issues Shall Be Tried By a Judge Without a Jury.

a. Statutory Language

Congress has dealt in three ways with the question of whether there should be a jury trial in civil litigation arising under Federal statutes. In some statutes Congress has provided that all issues shall be tried before a judge or referee alone, without a jury. See e.g., *Katchen v. Landy*, 382 U.S. 323, 328-336 (1966) (Bankruptcy Act). A second group of statutes require that some or all issues must be decided by a jury, regardless of whether a jury trial is mandated by the Seventh Amendment. See 5 Moore's Federal Practice § 38.12; note 2, *infra*. A third class of statutes make no reference to the trier of fact, leaving the question of jury trial *vel non* to be resolved solely by reference to the Seventh Amendment. See e.g.,

Beacon Theatres v. Westover, 359 U.S. 500, 504 (1959) (Declaratory Judgment Act).

In the instant case plaintiff submits that Title VIII of the 1968 Civil Rights Act requires that all questions of law and fact in any action arising thereunder be decided by the judge, not by a jury. The District Court construed that statute in this manner. (26a-28a). The defendants have heretofore maintained that Title VIII neither required nor forbade a jury trial, and that the question must be resolved by reference to the Seventh Amendment. Hearing of April 30, 1970, pp. 2, 13; Brief for Defendant-Appellant, p. 18; District Court Brief In Support of Jury Trial, p. 6. The Court of Appeals went beyond the position urged by defendant and held that Title VIII requires a jury trial (71a-73a).

The express language of the statute clearly indicates that the court, not a jury, is to decide whether to award damages. Section 812(c) of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c), provides:

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff. *Provided*, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees. (Emphasis added)

The meaning of "the court" is undeniably the same throughout this section. The entity authorized to award actual and punitive damages is the same entity authorized to grant injunctive relief, temporary restraining orders, court costs,

and attorney's fees. It is beyond question that only the trial judge, sitting without a jury, would pass on injunctive relief or costs and fees, and the statutory language requires that the question of damages be resolved in the identical manner.

The phrase "the court" is used elsewhere in Title VIII in a context where it can only refer to the trial judge sitting alone, not a jury or the judge with a jury. In litigation following the failure of conciliation under the statute, it is "the court" which may enjoin discrimination or order affirmative action. 42 U.S.C. § 3610(d). If, after the commencement of litigation, conciliation efforts appear likely to result in a settlement, "the court" is required to continue the case. 42 U.S.C. § 3612(a). "The court" is authorized, under circumstances it deems just, to appoint an attorney for a plaintiff in civil litigation under the Act. 42 U.S.C. § 3612(b). Any "court" in which a Title VIII case is instituted must expedite it in every way. 42 U.S.C. § 3614. When the same words are used in different parts of the same statute, they should be construed as having the same meaning throughout. *United States v. Cooper Corporation*, 312 U.S. 600, 607 (1941).

In numerous other statutes the phrase "the court" is used not merely to denote the trial judge, but to distinguish a trial judge from any jury. "The court" is to assess the issue in contractual forfeiture cases unless a jury is requested by either party. 28 U.S.C. § 1874. In arbitration cases where a jury is authorized and requested, "the court" refers the appropriate issues to the jury and "the court" issues the appropriate order thereafter. 9 U.S.C. § 4. An involuntary bankrupt is entitled to a jury as to certain issues, and the bankruptcy proceeding must be postponed if a jury is demanded and no jury is in attendance upon "the court." 11 U.S.C. § 42. In proceedings to condemn a

variety of substances, "the court" directs the manner of disposal or destruction of the goods after the jury, if requested, has found they are in violation of the law. 7 U.S.C. §§ 135g(b), 136k, 1595; 21 U.S.C. § 1049. The statutory right to a jury trial in certain cases does not apply to contempts committed in the presence of "the court." 18 U.S.C. §§ 3691, 3692; 42 U.S.C. §§ 1995, 2000h. The phrase "the court" is used in the Federal Rules of Civil Procedure to denote the trial judge, particularly to describe responsibilities of a judge as distinguished from those of a jury. Federal Rules of Civil Procedure 39, 47, 49, 50, 51, 52, 53(e)(3), 57. Congress must be assumed to have been aware of this widely accepted meaning of the phrase "the court" when it used that phrase in Title VIII. *Malat v. Riddell*, 383 U.S. 569 (1966); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, rehearing den. 391 U.S. 929.

Particularly significant is the use of "the court" to denote the trial judge throughout the Jury Selection and Service Act of 1968. That statute provides that "the court" may allow extra preemptory challenges, "the court" passes on challenges for cause, "the court" orders that names of prospective jurors be drawn, "the court" may excuse jurors from service, "the court" may order that jury records be retained for more than four years, and "the court" is to pass on challenges to the jury selection procedure. 28 U.S.C. §§ 1866-1870. These provisions were first proposed as Title I of the Civil Rights Act of 1966, the same bill which contained in Title IV the open housing provisions at issue in this case. See generally Hearings Before a Subcommittee on Constitutional Rights of the House Judiciary Committee, 89th Cong. 2d Sess. (1966); H.R. 14765, 89th Cong. 2d Sess.¹ The Jury Selection Act was finally en-

¹ Section 406(c) of that bill was substantially the same as section 812(c) of the statute finally enacted. See p. 15 *infra*.

acted two weeks before Title VIII in 1968. It must be presumed that the draftsmen of the 1966 bill and the Congress which passed these laws two years later intended "the court" to have the same significance in both.

Had Congress desired to require a jury trial, it would have done so expressly as it has elsewhere. In at least 22 other statutes Congress has by law conveyed just such a right, in each case using the words "jury" or "jury trial."²

Congress clearly knew how to make known any desire for jury trials in Title VIII cases; its failure to do so can only betoken its intention to have those cases tried before a judge. Had Congress wished to assure defendants jury trials in Title VIII cases, it would not have authorized state administrative proceedings in housing discrimination cases, since such proceedings do not involve any right to trial by jury. 42 U.S.C. §§ 3610(c), 3615,³ *N.L.R.B. v. Jones*

² 7 U.S.C. §§ 135g(b), 136k, 1595; 9 U.S.C. § 4; 11 U.S.C. § 42; 18 U.S.C. §§ 3691, 3692; 19 U.S.C. § 1305; 21 U.S.C. §§ 334(b), 882, 1049(a); 25 U.S.C. § 1302; 28 U.S.C. §§ 959, 1872, 1873, 1874, 2402; 39 U.S.C. § 840; 42 U.S.C. §§ 1995, 2000h; 46 U.S.C. § 688; 48 U.S.C. § 413.

³ At least twenty-four states have set up administrative agencies empowered to award damages.

Eleven state statutes expressly mention damages. Alaska Statutes, Title 18, § 22.10.020(c); California Civil Code § 35738(3); General Statutes of Connecticut, § 53-36; Hawaii Rev. Stat. § 515-13(b)(7); Ind. Code § 22-9-6(k)(i); Anno. Laws of Mass., Ch. 151 B, § 5; Minn. Statutes, § 363.071(2); New Mex. Stat. Anno. § 4-33-10 E; N.Y. Executive Law § 297(4)(c); General Laws of R.I. § 34-7-5(L); Wash. Rev. Code § 49.60.225. Twelve states authorize their agencies to order any affirmative action necessary to carry out the purposes of the state law. Del. Code Anno., § 4605(e); Iowa Code § 105A.9(12); Kan. Stat. Anno. § 44-1019; Ky. Rev. Stat. § 344.230; Anno. Code. Md. Article 49B, § 14(e); N.H. Rev. Stat. Anno. § 354-A:9; N.J. Stat. Anno. § 10:5-17; Ohio Rev. Code Anno., § 4112.05(G); Pa. Stat. Anno., Title 43, Ch. 17, § 959; S.D. Human Relations Act of 1972, L. 1972, S.B. 111, § 11(12); W. Va. Code, § 5-11-10; Wisc. Stat. Anno. § 101.60. These provisions have uniformly been held to authorize orders directing the payment of

& *Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Edwards v. Elliott*, 88 U.S. 532, 557 (1874).

This construction of Title VIII is supported by the wording and judicial interpretations of section 706 of the Civil Rights Act of 1964, authorizing private actions to enforce the Title VII ban on employment discrimination. Section 706(g), 42 U.S.C. § 2000e(f)(g), provides that "the court" may give injunctive relief and back pay.⁴ The lower courts reaching this question have uniformly held that all issues in a Title VII case should be heard and decided by a judge.⁵

damages. *Jackson v. Concord Company*, 45 N.J. 113, 253 A.2d 793 (1969); *Robinson v. Pauley*, No. H 29-72 (W. Va. Human Rights Commission), Equal Opportunity in Housing [hereinafter "EOH"] ¶ 17,504 (1972); *Bridges v. Mendota Apartments*, No. 898-H (D.C. Commission on Human Rights), EOH ¶ 17,505 (1972); *Jacoby v. Wiggins*, No. H-1582 (Pa. Human Relations Commission), EOH ¶ 17,502 (1972); *Lord v. Malakoff*, No. H-71-0062 (Md. Commission on Human Relations) EOH ¶ 17,503 (1972); *In Re Consolidated Properties*, No. 228 (Ohio Civil Rights Commission), EOH ¶ 17,506 (1972). The Oregon statute, Ore. Rev. Stat. § 659, 010-110, authorizing orders to "eliminate effects" of discrimination, has been held to authorize awards of damages. *Williams v. Joyce*, 4 Ore. App. 482, 479 P.2d 513 (1971).

⁴ "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ."

⁵ *Robinson v. Lorillard Corporation*, 444 F.2d 791, 802 (4th Cir. 1971); *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969) reversing 47 F.R.D. 327, 330-31 (N.D. Ga. 1968); *Lowry v. Whitaker Cable Corporation*, 348 F. Supp. 202, 209 n.3 (W.D. Mo. 1972); *Williams v. Travenol Laboratories*, 344 F. Supp. 163 (N.D. Miss. 1972); *Ochoa v. American Oil Co.*, 338 F. Supp. 914 (S.D. Tex. 1972); *United States v. Ambac Industries*, 15 F.R.Serv. 2d 607 (D. Mass. 1971); *Gillin v. Federal Paper Board Co., Inc.*, 52 F.R.D. 383 (D. Conn. 1970); *Moss v. Lane Company*, 50 F.R.D. 122 (W.D. Va. 1970); *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F.2d 754 (M.D. Ala. 1959); *Hayes v. Seaboard Coast Line R.R.*

b. Legislative History

The legislative history of Title VIII indicates that the statute was intended to preclude jury trials in actions such as this. A federal fair housing law was first proposed by President Johnson as part of the Civil Rights Act of 1966.⁶ Section 406 of the administration bill, like section 812(c) of the statute enacted two years later, authorized "the court" to award damages.⁷ At the Senate hearings on 1966 Senator Ervin expressly inquired as to whether a jury trial was provided by the proposed bill.

Senator Ervin. Now, I would like to know under the same subsection (c) of section 408 [sic] who determines the amount of damages that are to be awarded if a case is made out under Title IV of the bill.

Attorney General Katzenbach. The court does.

Senator Ervin. That is the judge.

Attorney General Katzenbach. Yes, sir.

Senator Ervin. There is no jury trial.

Attorney General Katzenbach. No, sir.

Senator Ervin. Well, is the administration opposed to or has it forsaken the ancient American love for trial by jury?

Co., 46 F.R.D. 49 (S.D. Ga. 1969); *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D. Ga. 1968), rev'd on other grounds 421 F.2d 888 (5th Cir. 1970); *Lea v. Cone Mills*, Civil Action No. C176-D-66 (N.D. N.C., order dated March 25, 1968); *Banks v. Local 136, I.B.E.W.*, Civil Action No. 67-598 (N.D. Ala., order dated January 25, 1968); *Anthony v. Brooks*, 67 LRRM 2897 (N.D. Ga. 1967). *Lea*, *Banks* and *Anthony* were decided prior to the enactment of Title VIII.

⁶ 112 Con. Rec. 9390 (1966).

⁷ "The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to \$500 punitive damages." S. 3296, § 406(c), 89th Cong. 2d Sess., 112 Cong. Rec. 9397 (1966).

Attorney General Katzenbach. No, sir. I assume if there was a suit here that was for purely damages that the court would use a jury.

Senator Ervin. Would the administration have any objection to subsection (c) being amended to spell out the fact that a man has a right to have the issues of fact arising in the case and the amount of damages determined by a jury instead of the judge.

Attorney General Katzenbach. No, in a damage suit I have no objection to that. With respect to the equitable relief I would, obviously.*

Neither an amendment like that proposed by Senator Ervin, providing for a jury trial on all issues of fact, nor an amendment like that acquiesced to by Attorney General Katzenbach, providing for a jury trial as to damages, was passed by the Congress. Instead this provision was enacted two years later in essentially the form objected to by Senator Ervin.⁸ The reason for the Attorney General's opposition to jury trials in Title VIII cases was made clear elsewhere. At a House hearing that year on the same Act

* Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 2, 1178 (1966).

⁸ Attorney General Katzenbach's prediction that courts would use juries in damage only actions seems to refer to the use of advisory juries. See Rule 39(c) Federal Rules of Civil Procedure. The term "use" as applied to juries is generally employed to describe the role given an advisory jury, not a jury sitting as the ultimate trier of the facts. See 5 Moore's Federal Practice ¶ 39.10. Such advisory juries have in fact been used under the similar provision of Title VII. *Cox v. Babcock and Wilcox Company*, 471 F.2d 13 (4th Cir. 1972); *Moss v. Lane Company*, 471 F.2d 853 (4th Cir. 1973). The Attorney General's assumption regarding future practice under Title VIII does not purport to be a construction of those provisions. For reasons set forth *infra*, pp. 27 and 39, a jury trial would not be constitutionally required in an action seeking only damages.

Attorney General Katzenbach was asked his views on a proposed bill creating a civil action for damages on behalf of victims of civil rights related violence. He responded candidly, "I would not be sanguine in such community about the capacity to recover from a jury in that situation. I would be inclined to doubt it might occur."¹⁰ The Attorney General expressed similar reservations about the likelihood of obtaining convictions from any jury under a proposal to make criminal economic coercion in civil rights cases.¹¹

This construction of section 812(c) is supported by the treatment of jury trials in contempt cases during the legislative history of Title VIII. The first proposed provision, Title IV of the 1966 Civil Rights Act, expressly directed that in any contempt proceeding for violation of any injunction under that Title the defendant would be entitled to a trial *de novo* before a jury if the court upon conviction set a fine in excess of \$300 or imprisonment for more than 45 days.¹² Attorney General Katzenbach testified he

¹⁰ Hearings Before a Subcommittee of the House Judiciary Committee, 89th Cong., 2d Sess., 1183 (1966). The Civil Rights Act of 1966 and 1968 proposed by the President dealt with discrimination in jury selection as well as in housing. The Fair Housing Law and the Jury Selection and Service Act were enacted within weeks of each other in 1968. See p. 12 *supra*. The instant hearings dealt with both problems, and included testimony regarding the refusal of southern juries to convict white defendants in civil rights cases. See e.g. *Id.* at 1321 (Remarks of Congressman Ryan), 1331 (Remarks of Congressman Diggs), 1142 (Remarks of Roy Wilkins), 1519 (Remarks of Whitney Young).

¹¹ Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. 175-176 (1966).

¹² Section 410 of the bill provided: "All cases of criminal contempt arising under the provisions of this title shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995)." Section 1995 provides in pertinent part:

In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be pun-

supported this limited right to jury trial as "a quite wise balance between the need of the Court to have respect and to vindicate its own decisions, and for the right of the individual not to have any major encroachments on his freedom and liberty without the benefit of trial by jury."¹³ The proposed Fair Housing Act of 1967, supported by the administration, made no express reference to the problem of criminal contempts,¹⁴ tacitly relegating that matter to the inherent power of the courts to enforce their decrees and the limitations thereon imposed by this Court. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).¹⁵ Similarly the bill finally enacted by Congress in 1968 deleted this jury trial requirement. Had the original draftsmen of section

ished by fine or imprisonment or both: *Provided, however*, That in case the accused is a natural person the fine to be paid shall not exceed the sum of \$1,000, nor shall imprisonment exceed the term of six months: *Provided further*, That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of \$300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

¹³ Hearings Before a Subcommittee of the House Judiciary Committee 89th Cong., 2d Sess. 1238-39 (1966); see also Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. 17 (1966).

¹⁴ S. 1358, 90th Cong., 1st Sess.; see Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Banking and Currency Committee, 90th Cong., 1st Sess. 1-7 (1967) (Testimony of Attorney General Clark).

¹⁵ The right to jury trial afforded by the Sixth Amendment is, in general, limited to cases involving sentences in excess of six months. *Bloom v. Illinois*, 391 U.S. 194 (1968). The jury trial authorized by the 1966 bill covered sentences exceeding 45 days as well as fines of more than \$300. See n. 12 supra.

812(c) in 1966 desired jury trials in civil actions thereunder, they would have said so expressly as they did at first regarding criminal contempts. It is unlikely that Congress, having considered and declined to authorize jury trials in such contempt cases, would have required such trials in civil actions whose consequences to a defendant were far less serious.

c. Constitutional Consideration

The Court of Appeals refused to construe Section 812 as requiring that all issues be tried to a judge because of its "grave doubts" as to the constitutionality of the statute if so construed. The Court of Appeals applied the established canon of construction that, where fairly possible, statutes should be interpreted so as to avoid serious question as to their constitutionality (Pp. 71a-73a). That canon, however, has no application where important constitutional considerations militate in favor of both alternative constructions under consideration. In this case the statutory requirement that these cases be tried to judges rather than juries is essential to carrying out the Act's purpose of enforcing the guarantees of the Thirteenth and Fourteenth Amendments, and to assure to plaintiffs the fair trial guaranteed by the Due Process Clause of the Fifth Amendment. Under such circumstances the canon can provide no guidance, and the Court must construe the statute in view of its language and history and then resolve any constitutional questions which may arise.

Congress's decision to bar jury trials in Title VIII cases occurred in the context of 35 years of congressional concern, debate and legislation concerning the role of juries in civil rights legislation. For several generations after Reconstruction Congress took no action to effectuate the guarantees of the Thirteenth, Fourteenth and Fifteenth

Amendments. During the 1930's federal legislation was proposed under the Fourteenth Amendment to deal with lynchings in the South. One of the few such proposals to reach the floor of either house was a bill introduced by Senator Wagner to authorize criminal and civil damage actions against public officials or local governments which failed to prevent such lynchings.¹⁶ Senator Bailey of North Carolina, opposing the bill, openly predicted that southern juries would refuse to enforce the law.

I say to the Senate that when that kind of suit is brought, in the first place, the jury in the county is not going to bring in a verdict for the Attorney General of the United States. Oh no—we are not going to think of doing such a thing. . . . I have tried cases for 25 years in the United States and in the state courts of North Carolina, and I have never known any difference as to juries. They are a fine body of men in either circumstance, but they are men who have a sense of loyalty to their county and a sense of loyalty to their people.¹⁷

The anti-lynching bill never came to vote. In 1949 Congressman Powell of New York proposed a Fair Employment Practices Act to end racial discrimination in hiring and promotion.¹⁸ Representative Powell proposed that enforcement be entrusted to a Fair Employment Practices Commission similar to the National Labor Relations Board, in part because "commission procedure avoids the necessity of criminal penalties which juries hesitate to invoke." 96 Cong. Rec. 2168. This denial of a right to trial by

¹⁶ H.R. 1507, 75th Cong. 2d Sess.

¹⁷ 82 Cong. Rec. 77 (1937); see also 83 Cong. Rec. 141 (1938) (Remarks of Senator Borah).

¹⁸ H.R. 4453, 81st Cong. 2nd Sess.

jury was objected to by opponents of the bill, 96 Cong. Rec. 2177, 2182, 2200, 2201, 2203, 2204, 2249, and an amendment to deny enforcement powers to the Commission was narrowly passed, 96 Cong. Rec. 2253. The bill was approved by the House only to die in the Senate.

The conflict between the use of jury trials and the effective enforcement of civil rights legislation was fully aired in the debates leading to the Civil Rights Act of 1957.¹⁹ When the bill was first proposed in 1956, Attorney General Brownell asked for civil rather than criminal sanctions so as to avoid jury trials, 102 Cong. Rec. 13141, and the administration bill provided there would be no jury trial in contempt prosecutions for violation of injunctions obtained by the United States. Proponents of the bill argued at length that jury trials for contempt would nullify the statute, since racially prejudiced jurors would refuse to convict.²⁰ Numerous instances were cited in which southern juries had refused to indict or convict white defendants accused of violence against blacks or civil rights workers.²¹

¹⁹ 71 Stat. 634; see 28 U.S.C. §§ 1343, 1861; 42 U.S.C. §§ 1971, 1975-1975e, 1995.

²⁰ 102 Cong. Rec. 13175. (Remarks of Congressman Roosevelt); 102 Cong. Rec. 8409 (Remarks of Congressmen Madden, Scott), 8412 (Remarks of Congressman Keating), 8418 (Letter from the Attorney General), 8488 (Remarks of Congressman Chudoff), 8505 (Remarks of Congressman Addonizio), 8509 (Remarks of Congressman Pelley), 8535 (Remarks of Congressman Hillings), 8648 (Remarks of Congressman Dennison), 9193 (Remarks of Congressman Powell), 9216 (Remarks of Congressman Ashley), 12801 (Remarks of Senator Morse), 13312 (Remarks of Senator Knowland), 13316-17 (Remarks of Senator Morse), 13334 (Remarks of Senator Douglas).

²¹ 103 Cong. Rec. 8490 (Remarks of Congressman Celler), 12535 (Remarks of Senator Javits), 12588 (Remarks of Senator Humphrey), 12848 (Remarks of Senator Case), 12893 (Remarks of Senator Javits). See also n. 10, *supra*.

Senator Douglas urged:

[O]bvious[ly], southern juries . . . will tend to have color bias to begin with. Second, . . . at the termination of their service they must go back into the communities from which they came and be exposed to all the economic, social and at times physical pressures which may be brought to bear. . . . [I]t would be extremely difficult to obtain any deserved enforcement. . . . [Judges] tend to have greater respect for the law . . . [and] are somewhat insulated from the passions and prejudices of their community.²³

Proponents of a jury trial requirement repeatedly insisted that the right to trial by jury should apply to criminal contempts as to all other crimes, as a matter of policy or constitutional law.²³ The House rejected a jury trial requirement in contempt cases, 103 Cong. Rec. 9219, but the Senate adopted an amendment authorizing jury trials, 103 Cong. Rec. 13356, and the statute finally enacted provided a limited right to such trials. 42 U.S.C. § 1995.²⁴

Since the 1957 debates the dispute has continued with varying results. In the 1960 Civil Rights Act Congress

²³ 103 Cong. Rec. 12804.

²³ 102 Cong. Rec. 13180 (Remarks of Congressman Rivers); 103 Cong. Rec. 2014 (Minority Report), 8414 (Remarks of Congressman Colmer), 8501 (Remarks of Congressman Hyde), 8502 (Mr. Winstead), 8508 (Remarks of Congressman Poff), 8545 (Remarks of Congressman Abiff), 8552 (Remarks of Congressman Brown), 8559 (Remarks of Congressman Abernethy), 8649 (Remarks of Congressman Smith), 8655 (Remarks of Congressman Tuck), 8657 (Remarks of Congressman Davis), 8666 (Remarks of Congressman Ashmore), 8839 (Remarks of Congressman Smith), 9042 (Remarks of Congressman Walter), 12531 (Remarks of Senator O'Mahoney), 12571 (Remarks of Senator O'Mahoney), 12651 (Remarks of Senator Johnson), 13005 (Remarks of Senator Ervin), 13326 (Remarks of Senator Church). Congressman Poff also denied southern juries would refuse to enforce the law. 103 Cong. Rec. 8509.

²⁴ Supra, n. 12.

gave the courts power to enjoin certain discriminatory conduct without providing jury trials for contempt, despite the objection that this was part of "the growing tendency to do away with the jury system in the Federal courts."²⁵ The 1964 Civil Rights Act provided a right to jury trials in most cases of contempt, 42 U.S.C. § 2000h, but provided for non-jury trial civil actions arising in employment discrimination cases. 42 U.S.C. § 2000e-5; see n. 5, *supra*. As in 1957, the contempt jury trial provision was rejected by the House but imposed by the Senate,²⁶ and the debate closely resembled that of 1957.²⁷ That no jury trial would be available in civil actions for injunction and back pay was reiterated in the Senate debates by one of the bills' floor managers, in response to repeated questions by Senator Ervin; neither Senator Ervin nor any other proponent of jury trials in contempt cases asked for such trials in civil enforcement proceedings.²⁸ In the 1965 Voting Rights Act Congress gave the limited right to jury trial in contempt cases provided by the 1957 Act, 42 U.S.C. § 1973l,

²⁵ 106 Cong. Rec. 6375 (Remarks of Congressman Brooks); Senator Clark urged, "Certainly one cannot be confident that a jury drawn from the citizens in the southern district of Mississippi would be eager to make such a finding in favor of Negro fellow citizens who have been denied the right to vote! . . ." 106 Cong. Rec. 7241.

²⁶ 110 Cong. Rec. 2804 (House Vote), 13051 (Senate Vote).

²⁷ For arguments that jury trials would emasculate the law, see 110 Cong. Rec. 1993 (Remarks of Congressman Taft), 2266 (Remarks of Congressman Gilbert), 8660 (Remarks of Senator Morse), 9818 (Remarks of Senator Javits), 12958 (Remarks of Senator Humphrey). Advocates of jury trials once again pointed to the Constitution, 110 Cong. Rec. 8700 (Remarks of Senator Fulbright), 9565 (Remarks of Senator Johnston), 9681 (Remarks of Senator Long). See generally 110 Cong. Rec. 9572-3, 10164-5, 2272, 8649-57, 8700-8703, 10077-80, 10563-4, 12926, 11204-5, 10340-1, 9685-6, 10203-09, 9817-19, 9917-19, 10111, 11012, 10199-203, 12953-4, 13050-1.

²⁸ 110 Cong. Rec. 7693. Senator Ervin did make such a proposal eight years later. See n. 30, *infra*.

the House having rejected, after brief debate, an amendment that would have required jury trials in all contempt cases. 111 Cong. Rec. 16263. The proponents of open housing legislation first proposed and then deleted the limited jury trial right in contempt cases in the 1957 statute, and the Congress which enacted Title VIII also established new rules to prevent racial discrimination in the selection of federal juries.²⁰

In sum, Congress, out of a repeatedly expressed concern that juries would refuse to enforce civil rights legislation, has provided only a limited right to jury trial in criminal contempt cases arising under such enactments, and has consistently refused to sanction jury trials in civil enforcement proceedings.²⁰ A similar concern has been expressed by a number of lower courts in enforcing civil rights legislation.²¹

²⁰ See *supra*, p. 12.

²⁰ In 1972 Senator Ervin proposed to require jury trials in Title VII civil actions, conceding the Seventh Amendment did not apply to such equitable proceedings but urging that its salutary policies should be enforced in all such cases. Senator Javits objected, "If it is valid for this, why is it not valid for all proceedings under the 14th amendment, which would include education, housing, and everything else in the Civil Rights Act of 1964?" The proposal was rejected. 118 Cong. Rec. 2277-2278 (Feb. 22, 1972) (Daily Ed.).

²¹ The District Court at oral argument on the jury trial motion in this case:

"[T]his issue has been debated as long as I can remember in Congress and all the civil rights legislation passed since 1948, I believe. And I think the general consensus is that if you have jury trials, civil rights legislation, you don't really result in very effective legislation, so Congress—pro civil rights people shred away from it." Hearing of April 30, 1970, p. 13.

In *Lawton v. Nightingale*, 345 F.Supp. 683, 684 (N.D. Ohio, 1972), the district court held there was no right to a jury trial for damages under 42 U.S.C. § 1983:

"[A] contrary holding would, in many instances, totally defeat the purposes of § 1983. If a jury could be resorted to in

The constitutional policies which such legislation enforces, in this case those of the Thirteenth and Fourteenth Amendments, are no less important than those of the Seventh. Plaintiff does not maintain that the protections of the Bill of Rights should not extend to defendants in civil rights cases; on the contrary, plaintiff recognizes that those protections, including the right to jury trial, are a bulwark against government oppression, and should not be withheld even in the name of liberty itself. Compare *United States v. Barnett*, 376 U.S. 681 (1964). A seriously debilitating limitation on Title VIII may be imposed if unequivocally required by the Seventh Amendment, but should not be merely because of "serious doubts." The Court should accord section 812 its natural interpretation as prohibiting jury trials, and resolve explicitly the Seventh Amendment questions posed by that construction.²²

actions brought under this statute, the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views. This is particularly the problem in the present case, where the plaintiff is so unpopular, scorned and condemned that this Court's granting of preliminary injunctive relief provoked rioting among his protesting fellow students, and editorial denunciation from the local information media."

See also Note, *Jones v. Mayer*: The Thirteenth Amendment and the Federal Anti-Discrimination Laws, 69 Colum. L. Rev. 1019, 1051; Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U.Chi.L.Rev. 167, Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1264; Note, The Right to Nonjury Trial, 74 Harv. L. Rev. 1176 (1961).

²² During the 1957 voting rights debates Senator Bricker commented:

"[The] power [of Congress] in that field is plenary, so long as it is confined to the enforcement of the Fifteenth Amendment. That power should not be crippled by jurors drawn from the very community in which voting by some of our citizens is prevented or discouraged by a majority of the resi-

At stake in the instant case is not only the enforcement of vital legislative and constitutional policies, but also the right of an individual litigant to a fair trial. Aside from the constitutional basis of the instant statute, plaintiff is entitled to have her claims heard by a fair trier of fact, not a jury hostile to her from the outset because of its personal prejudices against blacks or against open housing. This Court has long recognized the right of a litigant under the Due Process clause of the Fifth Amendment to a verdict untainted by racial prejudice or discrimination. *Moore v. Dempsey*, 261 U.S. 86, (1923); *Shepherd v. Florida*, 341 U.S. 50, 55 (1951).

Plaintiff does not of course maintain that a constitutional fair jury trial would be impossible to obtain in a case such as this. Extensive *voir dire*, for example, could substantially increase the likelihood of an impartial panel. See, e.g., *Connecticut v. Seale* (No. 15844, Dist. Ct. New Haven); Garry, "Attacking Racism in Court Before Trial," *Ginger, Minimizing Racism in Jury Trials* (1969). But the substantial danger that litigants in civil rights cases will not get a fair hearing if subject to the whims of a racially biased jury requires that jury trials in such cases only be provided if the Seventh Amendment will permit no other result.

dents. . . . We cannot hope to reconcile these competing values—effective enforcement of the right to vote and the right to trial by jury—by a literal reading of the Constitution. . . . I have confidence that the Federal Judiciary will work out the problem without doing violence to any fundamental principles which we have always considered to pertain to the inalienable rights of the people of the United States." 103 Cong. Rec. 13003-05.

II.

The Seventh Amendment Does Not Require Jury Trials in Actions Arising Under Title VIII.

Section 812(c) requires that Title VIII cases be tried by the court without a jury, and any federal statute carries with it a presumption of constitutionality. *United States v. Di Re*, 332 U.S. 581, 585 (1948.) Under the decisions of this Court no jury trial is required in a civil action if either the right being reinforced is one unknown at common law, or the remedy involved is one which equity could have afforded. Both of those circumstances are present in cases arising under Title VIII.

a. The Rights Protected by Title VIII Were Unknown At Common Law

The Seventh Amendment preserves the substance of the right to a jury trial which existed at common law when the Amendment was adopted in 1791. The amendment is, by its own terms, merely preservative, in marked contrast to the other guarantees of the Bill of Rights which are expansive in nature and adapt to include within their coverage problems which could not have been foreseen when they were enacted. Compare *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The constitutional right to jury trials is preserved in, but limited to, suits which the common law recognized among its old and settled precedents and suits involving such legal rights and remedies in modern guise. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

When Congress creates new rights which did not exist at common law and are not analogous to rights that were recognized at common law, however, it is free to grant or deny the right to jury trial as long as the procedure it

established satisfies due process. Prior to the National Labor Relations Act³³ an employer was free to refuse to hire union members and to fire employees who joined a union. Any prohibition against interference by employers with self-organization of employees was not only unknown, but obnoxious to the common law.³⁴ The Act reversed this rule and guaranteed to employees the right to organize without coercion or interference by their employer. The Act authorized an award of wages and back pay for violations of the law without recourse to a jury, and this Court sustained that procedure:

"It is argued that [assessment of such awards] is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury . . . The Amendment thus preserves the right which existed under the common law when the Amendment was adopted . . . It does not apply where the proceeding is not in the nature of a suit at common law . . .

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement."

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937).

This Court has held that, because the right involved did not exist at common law, the Seventh Amendment does not

³³ 29 U.S.C. §§ 151 *et seq.*

³⁴ *Aquilines Inc. v. N.L.R.B.*, 87 F.2d 146, 150 (5th Cir. 1936).

guarantee a jury trial in actions for damages against the United States, *McElrath v. United States*, 102 U.S. 426, 440 (1880), suits to recover improperly collected taxes, *Wickwire v. Reinecke*, 275 U.S. 101, 105-106 (1929), or administrative proceedings to cancel a naturalization certificate, *Luria v. United States*, 231 U.S. 9, 11 (1913), assess penalties for unlawful transportation of aliens, *Oceanic Steam Navigation Co. v. Stranahon*, 214 U.S. 320, 329 (1909), or appraising the value of dutiable goods, *Passavant v. United States*, 148 U.S. 214, 221 (1893). The ability of a court to award damages without a jury because the right sued upon was unknown at common law was upheld in actions for violation of the Railway Labor Act, *Brady v. T.W.A., Inc.*, 196 F. Supp. 504 (D. Del. 1961), to compel arbitration as to back pay, *Northwest Airlines, Inc. v. Airline Pilots Assn., Intl.*, 373 F.2d 136, 142 (8th Cir. 1967), cert. denied 389 U.S. 827 (1967), for wages unlawfully withheld in violation of the Fair Labor Standards Act, *Wirtz v. Wheaton Glass Co.*, 253 F. Supp. 93, 95 (D. N.J. 1966), for refund of rent overcharges pursuant to the Emergency Price Control Act, *Creedon v. Arielly*, 8 F.R.D. 265, 268 (W.D. N.Y. 1948), and to collect back pay under Title VII of the 1964 Civil Rights Act.²²

The right of a black person to sue for redress because of a racially motivated refusal to sell or lease real property was certainly unknown at common law. At common law, a citizen was free to contract or not contract for the sale or disposition of his land, goods, and services, and this liberty was held to be protected against unreasonable gov-

²² *Culpepper v. Reynolds Metals Co.*, 296 F.Supp. 1232, 1241 (N.D. Ga. 1968), rev'd on other grounds, 421 F.2d 888 (5th Cir. 1970).

ernment infringement by the Due Process Clause of the Fourteenth Amendment."

The common law freedom of contract and alienation were uniformly held to entitle a landowner to refuse to sell his property because of the race of the would-be buyer.³⁷ Nor was there any redress at law if a property owner refused to lease on account of race.³⁸

³⁶ *Allgeyer v. Louisiana*, 165 U.S. 578, 587 (1897); *Booth v. Illinois*, 184 U.S. 425, 428 (1902); *Bean v. Patterson*, 122 U.S. 496, 499 (1887). Chief Justice Marshall referred to "that absolute power which a man possesses of his own property, by which he can make any disposition of it which does not interfere with the existing rights of others." *Sexton v. Wheaton*, 21 U.S. (8 Wheat.) 229, 242 (1824). The right of free alienation or disposition in any lawful manner was held to be one of the chief elements of property, as that term was understood at common law. *Jones v. Clifton*, 101 U.S. 225, 228-229 (1880); *Osage Oil & Refining Co. v. Chandler*, 287 F. 848 (2d Cir. 1923).

³⁷ A refusal to sell on the grounds of race gave the would-be buyer no legal remedy whatsoever. *People ex rel. Gaskill v. Forest Home Cemetery Co.*, 258 Ill. 36, 101 N.E. 219 (1913); *Kochler v. Rowland*, 275 Mo. 573, 205 S.W. 217 (1918). "[I]f it was distasteful to plaintiff to have a colored man as his adjoining neighbor, he had the legal right to refuse to sell him or his agents the property in controversy. In other words, no man is bound to sell his property to a proposed purchaser, whose presence is unsatisfactory to him as a neighbor, whether he be white, black, or of some other color." *Keltner v. Harris*, 196 S.W. 1, 2 (Mo. 1917).

³⁸ *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950); *Wyatt v. Adair*, 215 Ala. 363, 110 So. 801 (1926). "The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals." *Corrigan v. Buckley*, 299 F. 899, 901 (D.C.Cir. 1924), app. dismissed, 271 U.S. 323 (1926). "[W]hen the defendant refused to lease apartments to the plaintiff [who was Jewish] it exercised only the right which every landlord undoubtedly has to make his own selection of tenants." *Alsborg v. Lucerne Hotel Co.*, 46 Misc. 617, 618, 92 N.Y.S. 851, 852 (1905). "Non-Caucasians are and always have been just as free to restrict the use and occupancy of their property to members of their own races as Caucasians have been. The fact that the members of the Caucasian race have freely availed themselves of this right throughout the nation, even though those of the non-

The force of the law was available to assist a white landowner who wished to prevent the purchase or lease of land by blacks. "At the time the United States Constitution containing the first ten amendments was adopted, slavery was a legal and economic fact of life. . . . It is tautological that actions alleging racial discrimination could have not then been maintained for race discrimination had as its support the full weight and authority of law." *Marr v. Rife*, Civ. No. 70-218 (S.D. Ohio, opinion dated August 31, 1972.) In certain states of the ante-bellum South, free blacks were legally incapable of taking or acquiring any leasehold or freehold interest in real property. *Heirn v. Bridault*, 37 Miss. 209 (1859); *Beall v. Drane*, 25 Ga. 430 (1857). See also *Swoll v. Oliver*, 61 Ga. 248 (1878). Ratification of the Thirteenth and Fourteenth Amendments ended state restrictions on the power of blacks to lease or own property, but before *Shelley v. Kraemer*, 334 U.S. 1 (1948), the use of racially restrictive covenants in deeds and conveyances frequently prevented black citizens from buying property. Such covenants were recognized and enforced in many states. See e.g. *United Cooperative Realty Co. v. Hawkins*, 269 Ky. 563, 108 S.W.2d 507 (1937); *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596 (1919); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Parmalee v. Morris*, 218 Mich. 625, 188 N.W. 330 (1922); *Chandler v. Zeigler*, 88 Col. 1, 291 P. 822 (1930); *White v. White*, 108 W. Va. 128, 150 S.E. 531 (1929); *Cornish v. O'Donoghue*, 30 F.2d 983 (D.C. Cir. 1929). This

Caucasian races have not, is the most satisfactory proof of the public policy of the nation with respect to this phase of the right to contract. . . . The right to contract with reference to their own property is one that is preserved to all citizens and, except where restricted by law, is a right which the peoples of all races may exercise freely." *Burkhardt v. Lofton*, 63 Cal. App.2d 230, 238, 146 P.2d 720, 724-725 (1944).

Court held that the states could so assist white landowners desirous of discriminating against blacks, *Corrigan v. Buckley*, 271 U.S. 323, and ruled that Congress was not authorized by the Thirteenth and Fourteenth Amendments to prohibit such "[i]ndividual invasion of individual rights." *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

Against this background, congressional opponents of Title VIII asserted repeatedly that the proposed open housing law would violate long established principles of private property. Senator Byrd argued:

I am expressing the hope that Senators will want to retain that age-old property right which has come down to us from the earliest days of the *common law*: the right to manage, to use, to dispose of one's property whether or not the individual lives in the dwelling, according to the dictates of his own conscience and his own good judgment. . . .

I cannot understand how any one would urge that a would-be purchaser should have any legal claim, any constitutional claim, any moral claim, or any natural claim on that which he does not possess.

I hope that the Senate does not intend to give a prospective buyer that to which he has never had any claim since the earliest days of *common law*.

114 Cong. Rec. 4973 (1968) (Emphasis added). See also 114 Cong. Rec. 2718 (Remarks of Sen. Thurmond), 3135 (Remarks of Sen. Ellender), 3241 (Remarks of Sen. Holland), 3249 (Remarks of Sen. Ervin), 3476-77 (Remarks of Sen. Thurmond), 4063 (Remarks of Sen. Ervin), 4976-77 (Remarks of Sen. Byrd), 4976 (Remarks of Sen. Allott), 4977 (Remarks of Sen. Hansen) (1968).

A witness on behalf of the National Association of Real Estate Boards testified that his organization believed the bill was "repugnant to the principle of private property ownership—a principle whose roots are firmly embedded in the common law."³⁹ Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982, was also enacted despite a background of legal concern for the prerogatives of property ownership philosophically at odds with the purposes of that statute. *Jones v. Mayer Co.*, 392 U.S. 409, 449 n. 6 (opinion of Justice Douglas), 473-75 (dissenting opinion of Justice Harlan) (1968). A statute such as Title VIII which so revolutionized common law relationships *ipso facto* created rights which were unknown at common law and which can be enforced without trial by jury.

Despite this radical change in the common law worked by Title VIII, the Court of Appeals held that the rights it created were analgous to the action at law which was available against an innkeeper who refused, without justification, to provide lodgings to a traveler, and held that a jury was therefore available to try the action. (Pp. 62a-63a)

Under the common law of England, an innkeeper was bound to receive and lodge in his inn all travelers and to entertain them at reasonable prices without any special or previous contract, unless he had some reasonable grounds for refusal. *Rex v. Luellin*, [1700] 12 Mod.L.Rep. 445, 88 Eng. Rep. 141 (K.B.).⁴⁰ Because of the scarcity of inns,

³⁹ Hearing Before a Subcommittee of the Senate Banking and Currency Committee, 90th Cong. 1st Sess. 338 (1967).

⁴⁰ See also *Thompson v. Lacy* [1820], 3 B. & Ald. 283, 106 Eng. Rep. (K.B.); *Robins v. Grey* [1895], 2 Q.B. 501; 18 Halsbury, *Laws of England* 141 (2d ed. 1935); *Rex v. Ivens*, [1835], 7 C. & P. 213, 173 Eng. Rep. 94 (N.P.); *Regina v. Rymer* [1877], 2 Q.B.D. 136; *Fell v. Knight* [1841], 8 M. & W. 269 (Q.B.).

the vital importance of the services which they provided travelers, and the unavailability of advance bookings, a legally enforceable duty to serve the public was created by the act of holding one's self out as an innkeeper. *Rex v. Ivens* [1835] 7 C. & P. 213, 219, 173 Eng. Rep. 94, 96 N.P.). The duty of an innkeeper was thus a radical departure from the usual common law rule that a tradesman was free to choose his customers, and was strictly limited.

The innkeeper's duty did not extend to persons who leased lodgings for any extended period of time. Since the keepers of boarding houses, lodging houses, rooming houses and apartment houses did not hold themselves out to the public as providing transient accommodations for travellers, the innkeeper's duty did not apply to them, and they could refuse to serve whomever they pleased. *Thompson v. Lacy*, [1820] 3 B. & Ald. 283, 106 Eng. Rep. 667 (K.B.).⁴¹ One sued for violation of his duty as an inn-

⁴¹ See also *Sealey v. Tandy* [1902], 1 K.B. 296; *Dansey v. Richardson* [1854], 3 E.&B. 144, 159 (Q.B.); *Hundley v. Milner Hotel Management Co.*, 114 F. Supp. 206, 208 (W.D. Ky. 1953), *aff'd mem.*, 216 F.2d 613 (6th Cir. 1954); *Fay v. Pacific Improvements Co.*, 93 Cal. 253, 255, 26 P. 1099, 1100 (1891); *City of Independence v. Richardson*, 117 Kan. 656, 661, 232 P. 1044, 1046 (1925); *Good-year Tire & Rubber Co. v. Altamont Springs Hotel*, 206 Ky. 494, 497, 267 S.W. 555, 556 (1925).

If a traveller remained at an inn and contracted with his host for a term of permanent residence, their relations changed to that of tenant-landlord, and the host was no longer under a duty to accept the lodger. *Alpaugh v. Wolverton*, 184 Va. 943, 948, 36 S.E. 906, 908 (1946); *Shorter v. Shelton*, 183 Va. 819, 822-823, 33 S.E.2d 643, 644-645 (1945).

"The obligation to receive and entertain guests is . . . confined to innkeepers, that is to say, persons who keep inns properly so called, no such obligation resting upon the keeper of a mere lodging-house or a mere boarding house. . . ." 18 Halsbury, *Laws of England* 143 (2d ed. 1935).

keeper to provide accommodations could defend on the ground that he was a landlord who leased property for a term. *Parker v. Flint*, 12 Mod. Rep. 254, 256 (1699) (Holt J.).⁴² The special duty of an innkeeper also did not arise if the would-be guest was not a traveler, but a local resident able to return to his own home. 18 Halsbury, *Laws of England* 144 (2d ed. 1935).⁴³

In many states, race was recognized as a valid reason for refusing accomodation at an inn to a would-be guest. *State v. Steele*, 106 N.C. 766, 11 S.E. 478 (1890); *State v. Hicks*, 174 N.C. 802, 93 S.E. 964 (1917); *Frazer v. McGibbon*, 10 Ont. W.R. 54 (1907); Note, Hotel Law in Virginia, 38 Va. L. Rev. 815 (1952); Hartman, "Racial and Religious Discrimination by Innkeepers in the U.S.A." 12 Mod. L. Rev. 449 (1950); Note, An Innkeeper's 'Right' to Discriminate, 15 U. Fla. L. Rev. 109 (1962); *Story on Bailments* 486 (4th ed. 1866). Discrimination on the ground of race was likened to the economic discrimination against those travelers who were unable to pay high hotel prices. Cf. *DeWolf v. Ford*, 193 N.Y. 397, 401, 86 N.E. 527, 529 (1908). Although the question of whether a common law innkeeper could discriminate on the ground of race was not unequivocally resolved judicially,⁴⁴ this right of discrimination was

⁴² "The verdict finds he let lodgings only, which shows him not compellable to entertain anybody and that none could come there without a previous contract; that he was not bound to sell at reasonable rates, or to protect his guests."

⁴³ See also *Calye's Case*, 8 Co. 322, 77 Eng. Rep. 520, 77 Eng. Rep. 520 (K.B. 1584); *Rex v. Luellin*, 12 Mod. L. Rep. 445, 88 Eng. Rep. 1441 (K.B. 1700); *Horner v. Harvey*, 3 N.Mex. 307, 5 P. 329 (1885); *Kisten v. Hildebrand*, 48 Ky. 72 (1848); *Brown Shoe Co. v. Hunt*, 103 Iowa 586, 72 N.W. 765 (1897); *Roberts v. Case Hotel Co.*, 106 Misc. 481, 175 N.Y.S. 123 (Sup. Ct. App. Term 1919).

⁴⁴ Cf. *Constantine v. Imperial Hotels Ltd.*, 1 K.B. 693 (1944); *Civil Rights Cases*, 109 U.S. 3, 41 (1883) (Harlan J. diss.); *Christie v. York Corp.*, 1 D.L.R. 81 (1940), *Rogers v. Clarence Hotel*, 2 W.W.R. 545 (1940), *Franklin v. Evans*, 55 O.L.R. 349 (1924), *State v. Steele*, 106 N.C. 766, 11 S.E. 478, 484 (1890).

codified in a number of State statutes. See e.g. Fla. Stat. Ann. § 509.092 (1961); Ark. Stat. Ann. 671-1801 (Suppl. 1961); Del. Code Ann., tit. 24, § 1501 (1953); Miss. Code Ann. § 2046.5 (1959); Tenn. Code Ann. § 62-710 (1955). The innkeeper rule relied on by the Court of Appeals is manifestly inapplicable to a black plaintiff seeking an apartment in the same city in which she already resided.

b. The Relief Available in a Title VIII Case Is Part of a Single Integrated Equitable Remedy

Congress, greatly concerned to erect an effective scheme of enforcement, gave to the district courts in Title VIII actions "a complete arsenal of federal authority." *Jones v. Mayer Co.*, 392 U.S. 409, 417 (1968). The courts were authorized to appoint counsel for indigent plaintiffs, to expedite all related proceedings, to suspend proceedings if administrative conciliation was progressing well, and to award preliminary injunctions, final injunctions, actual damages, punitive damages, costs, and attorneys' fees.⁴⁴ The courts also retain and utilize, as in the instant case, their inherent power to try to effectuate a settlement between the parties.⁴⁵

These remedies are, in general, not mandatory; injunctive relief and the appointment of counsel are expressly confided to the court's discretion, and section 812(c) provides that the court "may" award punitive damages, actual damages, fees and costs. The court is charged with the responsibility of fashioning from this arsenal such relief in each case as will promote equal access to housing, "a policy that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 311 (1972). The plaintiff in such cases sues,

⁴⁴ 42 U.S.C. §§ 3612, 3614.

⁴⁵ See p. 47a.

not merely to vindicate a personal interest, but as a private attorney general seeking to carry out that public policy. *Id.* at 211.

The remedial scheme thus created is inherently equitable in nature. The remedy in each case is fashioned so as to promote an end to housing discrimination, not to penalize the wayward or collect any private debt. There is no absolute right to actual or punitive damages such as existed at common law, for these matters are entrusted to the discretion of the court.⁴⁷ "The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaption to circumstances, and the technical rules which govern their use." 1 Pomeroy, *Equity Jurisprudence* § 109 (5th ed. 1941). Equitable remedies, on the other hand, were distinguished by their flexibility and variety. *Alexander v. Hillman*, 296 U.S. 222, 239 (1935). Frequently a district court's decision as to whether or not to allow actual or punitive damages will depend upon its earlier or simultaneous decisions as to whether to award injunctive relief or costs or fees.⁴⁸ Such discre-

⁴⁷ A similar discretion exists under Title VII, where back pay may be denied if there are special circumstances rendering such an award unjust. Compare *Newman v. Piggie Park*, 390 U.S. 400 (1968). Such a case would exist where the defendant's discrimination had been in good faith compliance with an apparently valid state law. See e.g. *Le Blanc v. Southern Bell Telephone & Telegraph Co.*, 333 F. Supp. 602, 610 (E.D. La. 1971), *aff'd* 460 F.2d 1228.

⁴⁸ In the instant case, for example, the District Court considered among the reasons leading to its decision regarding remedy the fact that the defendants had already suffered a significant financial loss as a result of the preliminary injunction forbidding them from renting the apartment to anyone but plaintiff. P. 51a. See also *Bridges v. Mendota Apartments*, No. 898-H EOH ¶17,505 (D.C. Commission on Human Rights, opinion dated November 10, 1972) ("equity demands" assessment of damages where respondent refused to rent apartment and plaintiff had to take another one.) In its findings and conclusions of October 27, 1970, awarding puni-

tionary damages bear little resemblance to damages as they were known at common law, but are quite similar to the damages sometimes given as part of equitable clean up. Ordinarily the remedy fashioned in a Title VIII case will include specific performance of the contract which would have been entered into but for the plaintiff's race, an inherently equitable remedy. *Stewart v. Griffith*, 217 U.S. 323, 328 (1910); *Willard v. Taylor*, 75 U.S. (8 Wall.) 557, 566-68 (1870); *Rutland Marble Co. v. Ripley*, 77 U.S. (10 Wall.) 339, 357-58 (1870).

Congress intended that the forms of relief authorized by Title VIII be employed as part of a single interrelated equitable remedy, and the significance for Seventh Amendment purposes of any relief awarded must be assessed in this context. Where the statute contemplates that actual or punitive damages will only be awarded at the court's discretion and in light of its decisions as to injunctive relief, it would be error to attempt to evaluate the legal or equitable nature of such damages in isolation from such discretion and decisions. In granting relief under the analogous provisions of Title VII, the courts have used great flexibility in devising remedies to eradicate employment discrimination, and this remedial arsenal has been held to be equitable, even when a monetary award is made in a particular case. "The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion and not by a jury." *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1968).⁴⁹ This Court has taken a similar

tive damages but denying actual damages, costs and fees, the court commented, "It probably takes the wisdom of Solomon to decide these cases fairly." P. 51a.

⁴⁹ Accord: *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1241 (N.D. Ga. 1968), rev'd on other grounds 421 F.2d 888 (5th

approach to cases arising under the Fair Labor Standards Act and the Emergency Price Control Act of 1942. See *Yakus v. United States*, 321 U.S. 414 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Considered as part of a single integrated equitable remedy, the relief in any particular case is *ipso facto* equitable and does not give rise to a right of trial by jury.

c. A Court of Equity Could Constitutionally Award Legal Relief in This Case

Even if the various remedial devices authorized by Title VIII are considered separately, this case is still one properly heard in equity.

The injunctive relief authorized by Title VIII is, historically, purely a matter of equitable cognizance. *Stockton v. Russell*, 54 F. 224, 228 (5th Cir. 1892); *United States v. Debs*, 64 F. 724, 741 (N.D. Ill. 1894); *Fleming v. Peavy Wilson Lumbar Co.*, 38 F.Supp. 1001, 1002 (W.D. La. 1941). While damages are the preeminent remedy which was available at law, the fact that damages are available in an action does not make it *ipso facto* a suit at common law.

Cir. 1970); *Hayes v. Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49, 52-53 (S.D. Ga. 1968); *Cheatwood v. South Central Bell Tel. & Telegraph Co.*, 303 F. Supp. 754, 756 (M.D. Ala. 1969); *Smith-Hampton Training School For Nurses*, 360 F.2d 577, 581 n. 8 (4th Cir. 1966).

Cf. *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971) (no right to jury trial in suit brought by discharged black school teachers seeking reinstatement and back pay under 42 U.S.C. § 1983):

"Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to sever their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs. . . ."

427 F.2d at 324.

At least prior to the promulgation in 1938 of the Federal Rules of Civil Procedure, equity had the power to award monetary relief directly if an accounting were sought, and it could also assess and award damages along with equitable relief to prevent a multiplicity of lawsuits. If a ground for equitable relief existed, equity would not stop with the granting of such relief but would decide all aspects of the controversy, including legal issues. *Parker v. Dee*, 2 Ch. Cas. 200, 22 Eng. Rep. 910 (Ch. 1674); *Whitchurch v. Golding*, 2 P. Wms. 541, 24 Eng. Rep. 852 (Ch. 1729); *Camp v. Boyd*, 229 U.S. 530, 551 (1913); *Mobile v. Kimball*, 102 U.S. 691, 706 (1881); *Gormely v. Clark*, 134 U.S. 338, 349 (1890); *Middletown Bank v. Russ*, 3 Conn. 135 (1819); *Rathbone v. Warren*, 10 N.Y. 587 (1813); 1 *Pomeroy, Equity Jurisprudence* § 237C (5th ed. 1941); James, Civil Procedure 341 (1965). As an incidental part of equitable relief, the Chancellor could determine whether damages should be awarded and, if appropriate, could decree payment. *Clark v. Wooster*, 119 U.S. 322, 325 (1886); *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273, 279 (1917); *Imperial Shale Brick Co. v. Jewett*, 169 N.Y. 143, 62 N.E. 167 (1901); 1 *Story, Equity Jurisprudence* § 161 (14th ed. 1918).

Likewise, the fact that punitive damages were sought and recovered here does not render the suit one at common law. Historically, the inherent authority of a court of equity to award punitive damages was never definitively settled. Cf. *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559 (1854); *Colburn v. Simms*, 2 Hare 543, 553-554 67 Eng. Rep. 224, 229 (Ch. 1843); *Karns v. Allen*, 135 Wis. 48, 115 N.W. 357 (1908); *Busby v. Mitchell*, 29 S.C. 447, 7 S.E. 618 (1888), with *Bryson v. Bramlett*, 204 Tenn. 347, 321 S.W.2d 555 (1958); *I.H.P. Corp. v. 210 Central Park South Corp.*, 228 N.Y.S.2d 883, 16 A.D.2d 461 (1962), *aff'd*

12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963); *Hines v. Imperial Naval Store Co.*, 101 Miss. 802, 58 So. 650 (1911); *Union Oil Co. v. Reconstruction Oil Co.*, 20 Cal. App.2d 170, 66 P.2d 1215 (1937); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W. 2d 567 (Tex. 1963). Where, however, punitive or exemplary damages were authorized by statute, such remuneration was allowed in equity under the theory of equitable clean-up so that a multiplicity of lawsuits would be unnecessary for a suitor to obtain complete relief. *Coca-Cola Co. v. Dixi-Cola Laboratories*, 155 F.2d 59, 64 (4th Cir.), cert. denied 329 U.S. 773 (1946); *Taylor v. Ford Motor Co.*, 2 F.2d 473, 474 (N.D. Ill. 1924); *Brady v. TWA, Inc.*, 196 F. Supp. 504, 505-506 (D. Del. 1961); *William Whitman Co. v. Universal Oil Products Co.*, 125 F. Supp. 137, 162 (D. Del. 1954). Once the jurisdiction of equity attached, it had power to furnish full relief, "to grant everything that might be recovered at law[;] . . . [i]f the facts warranted, exemplary or punitive damages were properly allowed." *Aladdin Mfg. Co. v. Mantle Lamp Co. of America*, 116 F.2d 708, 716 (7th Cir. 1941). In suits for patent infringement, for example, the court could award treble damages since there was explicit statutory authorization for this, *Root v. Railway Co.*, 105 U.S. 189, 205 (1882); *Tilghman v. Proctor*, 125 U.S. 136, 149 (1888); *Birdsall v. Coolidge*, 93 U.S. 64, 69-70 (1877); *Seymour v. McCormick*, 57 U.S. (16 How.) 480, 488 (1853). Even where such infringement suits were tried to a jury, the trial judge rather than the jury was given power to assess punitive damages in appropriate cases. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1852); *Kennedy v. Lakso Co.*, 414 F.2d 1249, 1254 (3d Cir. 1969); *Randolph Laboratories, Inc. v. Specialties Development Corp.*, 213 F.2d 873, 875 (3d Cir.), cert. denied 348 U.S. 861 (1954), *Swofford v. B. & W. Inc.*, 336 F.2d 406, 412 (5th Cir.) cert. denied 379 U.S. 962 (1964); See also *Keller*

Products, Inc. v. Rubber Linings Corp., 213 F.2d 382, 387 (7th Cir. 1954). See *Shearer v. Porter*, 155 F.2d 77, 83 (8th Cir. 1946) (Assessment of punitive damages under Emergency Price Control Act of 1942 is for judge not jury).

Even if a defendant's plea for equitable relief failed, a court of equity would retain jurisdiction to grant damages, especially if the failure of remedy in equity was due to the wrongful acts of the defendant. *Denton v. Stewart*, 1 Cox Ch. 258, 29 Eng. Rep. 1156 (Ch. 1786); *Gulbenkian v. Gulbenkian*, 147 F.2d 173 (CA2 1945); *Gabrielson v. Hogan*, 298 F. 722 (CA8 1924); 1 *Pomeroy, Equity Jurisprudence* § 237 (5th ed. 1941).

Plaintiff's complaint sought relief in the form of an injunction requiring that the disputed apartment be leased to her and punitive damages.⁵⁰ The record demonstrates that her primary concern was to compel the defendants to rent the apartment to her; at the first hearing in this case plaintiff informed the court of her need for the apartment and her desire to move in as soon as possible, and her counsel stated he would be willing to accept the court's suggestion that the case be settled by renting the apartment to Mrs. Rogers.⁵¹ For several months, at the urging of the court, plaintiff continued to try to negotiate such a settlement.⁵² Defendant Leroy Loether adamantly refused to rent the apartment to her, and finally in April of 1970, five months after filing her original complaint, plaintiff—whose previous apartment had been unsanitary and at times without heat and hot water—was compelled to take another apartment and abandon her request for injunctive relief as to the Loether apartment.⁵³ At the hearing on

⁵⁰ Complaint, pp. 5a-6a.

⁵¹ Hearing of November 17, 1969, pp. 9, 10, 14.

⁵² *Id.* at 5, 8, 10, 11.

⁵³ Hearing of April 30, 1970, at p. 2.

final relief in October of 1970 the District Court awarded plaintiff \$250 in punitive damages.⁵⁴

The instant case presents precisely the sort of situation for which equitable clean up was intended.⁵⁵ The gravamen of plaintiff's complaint and action were for injunctive relief. Defendants' obdurate obstinacy eventually forced plaintiff to accept alternate housing and abandon her equitable claim. Had a court of equity not retained jurisdiction of such a case and awarded punitive or actual damages, the defendants would have succeeded by their stubborn delay in winning a case in which they could not have prevailed in open court. The final hearing on damages was substantially shortened by the court's detailed knowledge of the case acquired at the hearing on plaintiff's motion for a preliminary injunction, a saving not possible if the entire case had had to be tried before a jury.

It is thus clear that, had this case arisen prior to the merger of law and equity, it would have been maintainable

⁵⁴ Plaintiff's complaint did not seek compensatory damages. See pp. 5a-6a. The District Court's pre-trial orders, however, indicated that such damages were at issue in the case, and directed plaintiff to notify defendants of the nature of her claim and the evidence on which it was founded. Pp. 18a, 22a, 35a, 36a. Plaintiff never complied with this order, and at the hearing of October 26-27, 1970, the District Court ruled inadmissible any evidence of actual damages. Pp. 37a-46a.

At the conclusion of the October hearing the District Court stated "I do not believe there have been any compensatory damages proven in this case or out-of-pocket expenses of that nature." P. 51a. It is unclear whether the Judge so concluded because the evidence offered was insufficient, or because he had ruled it inadmissible. In view of the fact that both punitive and actual damages may be awarded as part of equitable clean-up, the reasons for the District Court's statement are not controlling.

⁵⁵ The Court of Appeals correctly noted that the back pay awarded in Title VII cases is in the nature restitution, an equitable remedy, and those cases do not depend upon the application of equitable clean up. P. 69a.

at equity and without a right to trial by jury. For many years before that merger, however, courts of equity had declined to exercise their discretionary jurisdiction where the effect of doing so would be to unfairly deprive a litigant of his procedural rights in an action at law. In *Welby v. John Duke, of Rutland* the petitioner brought a bill in Chancery to compel the respondent to abandon claims, and to discover and preserve the respondent's evidence of title and to adjudicate that title and enjoin respondent from claiming any right to the land [1773]. 2 Brown C. & P. 39, 1 English Reports 778 (K. B.). While a simple bill to perpetuate evidence was unobjectionable in equity, courts of equity had refused to entertain bills to establish a legal title. The court in *Welby* dismissed the bill on the ground, inter alia, that to do otherwise "would be subversive of the legal and constitutional distinctions between the different jurisdictions of Courts of Law and Equity." 1 Brown C. & P. at 42, 1 English Reports at 780.

The equitable doctrine announced in *Welby* was given added impetus in American courts by the enactment of the Seventh Amendment. In *Hipp v. Babin*, 60 U.S. 19 (1857) this Court, relying on *Welby*, denied equitable jurisdiction to an action to recover land, cognizable at law as ejectment, to which had been joined several incidental equitable claims of dubious merit. The Court ruled that, whenever a plaintiff had a remedy at both law and equity, he must proceed at law because of the defendant's constitutional right to a jury trial. In the cases which followed, this Court in denying equitable jurisdiction relied upon, without distinguishing as to import, the policy of *Hipp*, Section 16 of the Judiciary Act of 1789 prohibiting suits at equity "where plain, adequate and complete remedy may be had at law," the equitable maxim to the same effect, and the Seventh Amendment. *Whitehead v. Shattuck*, 138 U.S. 146 (1891);

Scott v. Neely, 140 U.S. 106 (1891); *Cates v. Allen*, 149 U.S. 451 (1893); *Hale v. Allinsor*, 188 U.S. 56 (1903). The reach of this doctrine was restricted by the limits inherent in legal remedies; when a case involved a substantial equitable claim as well as legal issues, the inability of a court of law to provide such equitable relief was an insurmountable procedural obstacle to the granting of a jury trial. *Ross v. Bernhard*, 396 U.S. 531, 542 (1970). The equitable cleanup doctrine retained its vitality in the face of *Hipp* and *Scott* because it dealt with cases involving a substantial equitable issue for which no adequate remedy existed at law. So long as law and equity were kept separate, equitable cleanup cases were completely consistent with the policies being pursued in *Hipp* and *Scott*.

In 1938, however, law and equity were merged by the Federal Rules of Civil Procedure, precipitating an unavoidable conflict between these two lines of cases. Since equitable remedies technically became available in any action tried before a jury, in virtually every case an adequate remedy existed at law. The statutory requirement that such cases be tried at law was repealed,⁴⁴ but the equitable maxim and the policy first announced in *Welby* and *Hipp* remained. This equitable policy clearly militated in favor of taking advantage of the merger of law and equity to extend jury trials to all cases raising legal issues, regardless of whether they might be incidental to equitable claims. The meaning of the Seventh Amendment, however, was not changed by the new Rules, and its literal requirements could no more be added to than reduced by any act of Congress or rules promulgated pursuant thereto. It remained for this Court to decide whether the federal courts should exercise their traditional discretion to refuse to hear as equitable actions cases involving both legal and equitable issues,

⁴⁴ 28 U.S.C. § 384 was repealed in 1948.

thus requiring those cases to be tried at law with an ensuing right to a jury trial on the legal issues.

In *Beacon Theatres v. Westover* the Court concluded that such an exercise of discretion was appropriate. Assuming *arguendo* that, in a traditional sense, the legal issues in case were incidental to the equitable issues, the Court held that equity's practice of deciding legal issues once it obtained jurisdiction had to be re-evaluated in the light of the liberal joinder provisions and merger of law and equity worked by the Federal Rules. 359 U.S. 509 (1959). Although the case in *Beacon Theatres* might have been heard at equity and without a jury trial prior to the Rules, the Court held that a jury trial should be provided. In *Dairy Queen v. Wood*, 369 U.S. 469 (1962), two admittedly equitable counts were joined with a claim for an "accounting," a traditional equitable remedy. An accounting was available at equity in situations so complicated that only a court of equity could unravel them. While *Dairy Queen* might have been such a case a century before, the power of district courts to appoint masters to assist juries greatly reduced the necessity for this equitable remedy as it had for cleanup. Federal Rule of Civil Procedure 53(b). Thus, as in *Beacon Theatres*, the court could exercise its discretion to order a jury trial without denying the plaintiff an adequate remedy. *Ross v. Bernhard* combined an equitable doctrine of standing, permitting stockholder derivative actions, with a legal claim being asserted on behalf of the corporations. Prior to 1938 equity had to retain jurisdiction over such a case, since a stockholder had no remedy at law. The merger of law and equity permitted the Court to provide the equitable remedy of a derivative action in a case to be tried as one at law and before a jury. 396 U.S. 531 (1970).

Beacon Theatres and its progeny, however, were not constitutional decisions, at least not in the sense involved in

Marbury v. Madison, 1 Cranch (U.S.) 137 (1803). The right to a trial by jury in those cases derived from the decision of Congress to merge law and equity through the Federal Rules. That right would cease to exist if Congress once again divided law and equity. A right conferred by the Constitution, on the contrary, is "a superior law, unchangeable by ordinary means" and is not "alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch (U.S.) at 177. The decisions at issue since 1938 repeatedly refer to this non-constitutional basis.⁵⁷ In *Beacon Theatres* the Court held that a jury trial was required "under the Declaratory Judgment Act and the Federal Rules of Civil Procedure," 359 U.S. at 506, in view of the "long-standing principle of equity" that jury trials should be afforded whenever possible. 359 U.S. at 510. The Declaratory Judgment Act and Federal Rules were said to affect "the scope of equity," 359 U.S. at 509, not the meaning of the Constitution. In *Dairy Queen* the Court said that cases in which an equitable accounting might be had for complicated financial problems would be rare in view of the provisions of Rule 53(b) authorizing the appointment of a master to assist a jury. 369 U.S. at 478. In *Ross v. Bernhard* the Court stressed that stockholder derivative actions could be tried to juries because "[a]fter adoption of the rules there is no longer any procedural obstacle to the assertion of legal rights before juries. . . ." 396 U.S. at 542.⁵⁸

⁵⁷ This characterization of these decisions as an equitable doctrine is not without exception. *Ross* in particular contains a significant amount of constitutional language. 396 U.S. at 533-35, 538, 542.

⁵⁸ Each of these cases involved the danger that circumstances might have been manipulated to defeat the right to jury trial. In *Beacon Theatres* the plaintiff had attempted to sue in equity rather than waiting to be sued at law. 359 U.S. at 504. In *Dairy Queen* the plaintiff tried to characterize a contract action as an accounting. 369 U.S. at 477-78. In *Ross* it was the plaintiff stockholders who sought a jury trial, which would have been mandatory if re-

In view of this non-constitutional basis of *Beacon Theatres* and its progeny, it could have been anticipated that this line of cases would not be applied where Congress expressly commanded non-jury trials. Such a statutory provision would only be invalid if it interfered with the jury trial right provided by the Seventh Amendment itself, not merely the broader right enforced by equity since 1938. That question was presented to this Court in *Katchen v. Landy*, 382 U.S. 323 (1966), where a claimant maintained he had a constitutional right to a jury trial despite the contrary provision of the bankruptcy laws.⁴⁹ Noting that the rule in *Beacon Theatres* and *Dairy Queen* was "an

quested by the corporation whose officers, plaintiffs alleged, were controlled by the defendant. 396 U.S. at 531. No such manipulation is involved here.

⁴⁹ Six years before *Katchen* the Court sanctioned the use of equitable clean-up to award damages without a jury in a case arising under the Fair Labor Standards Act. *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960). In that case section 17 of the Act gave to the district courts jurisdiction to "restrain" violations of the Act, an authorization of equitable relief contemplating a judge sitting without a jury. This Court interpreted the law to authorize the same judge to order reimbursement of lost wages. 361 U.S. at 289-296. Three members of the Court dissented, urging such wages should be recovered only in an action under section 16 of the Act, which the dissenters construed as affording a defendant a jury trial. 361 U.S. at 303. The dissenters agreed "that an equity court, proceeding under unrestricted general equity powers, may decree all the relief, including incidental legal relief, necessary to do complete justice between the parties," 361 U.S. at 299, and did not question the constitutionality of a statute authorizing the granting of such incidental legal relief without a jury trial. 361 U.S. at 299.

In *Ross v. Bernhard* the Court noted that the unavailability of equitable relief in a court of law prior to 1938 constituted a "procedural obstacle" to the expansion of the right to jury trial worked by *Beacon Theatres* and its progeny. 396 U.S. 531, 542. Any such procedural obstacle to the exercise of a constitutional right would, except in the most compelling circumstances, be invalid. The constitutionality of this obstacle was never questioned by this Court, before or after the promulgation of the Federal Rules in 1938.

equitable doctrine," 382 U.S. at 339, the Court concluded that the delay and expense of a jury trial would be inconsistent with the purposes of the Bankruptcy Act. The Court stressed that in *Katchen*, unlike *Beacon Theatres* and *Dairy Queen*, Congress had expressed its will in "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." 382 U.S. at 339. The Court concluded that it should uphold the power of the bankruptcy court to summarily adjudicate a claim in order to "implement congressional intent." 382 U.S. at 340.

Katchen is dispositive of the instant case. The draftsmen of Title VIII were greatly concerned to devise an effective method of enforcement, particularly in view of the failure of many state laws to accomplish the same goal of open housing.⁶⁰ Speed of enforcement was acknowledged to be a key problem, because once a home or apartment had been sold or leased to another person the statutory purpose would be largely frustrated.⁶¹ To assure such effective enforcement, Congress provided district judges with an unprecedented array of remedial devices, and

⁶⁰ See, e.g., Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Banking and Currency Committee, 90th Cong., 1st Sess., 15-16, 20, 26 (remarks of Attorney General Clark); 33 (remarks of Secretary Weaver); 50 (remarks of Senator Proxmire), 60-72 (memorandum on state laws), 73 (remarks of Senator Mondale), 81 (statement on behalf of U.S. Civil Rights Commission), 99 (remarks of Roy Wilkins), 165 (remarks of Louis Pollak), 175 (remarks of Algernon Black), 217 (remarks of Edward Rutledge), 361 (remarks of Jacob Rudid) (1967); Hearings Before a Subcommittee of the House Judiciary Committee, 89th Cong. 2d Sess. 1054 (Message From President Johnson) (1967).

⁶¹ See, e.g., Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Banking and Currency Committee, 90th Cong., 1st Sess., 15-16 (Remarks of Attorney General Clark), 473-4 (letter from Pennsylvania Human Relations Commission) (1967); Hearings Before a Subcommittee of the House Judiciary Committee, 89th Cong. 2d Sess. 1309-10 (remarks of Attorney General Katzenbach) 1306 (remarks of Secretary Weaver) (1967).

broad discretion in their employment. See pp. 36-37, *supra*. Congress directed that the case be set for hearing "at the earliest practicable date" and "be in every way expedited." 42 U.S.C. §3614. To impose in Title VIII cases the delay, expense, and possible prejudices of a jury would be to dismember this carefully devised Congressional scheme. *Katchen v. Landy*, 382 U.S. at 339. A strong presumption of constitutionality attaches to any Federal statute such as Title VIII which effectuates important public policies, *United States v. Di Re*, 332 U.S. 581, 585 (1948); no such presumption or policies were involved in *Beacon Theatres*, to decline to exercise jurisdiction over cases traditionally *Dairy Queen* or *Ross*. Courts of equity have no discretion within their authority when Congress directs that such cases not be tried at law. If a jury were required by the Seventh Amendment, of course, it could not be avoided by such Congressional intent. But no such result was required by the Seventh Amendment before 1938, and the meaning of the Constitution was not changed by the promulgation of the Federal Rules of Civil Procedure.

CONCLUSION

Section 812(c) provides that cases arising under Title VIII shall be tried by a judge without a jury. This requirement is an essential part of the enforcement measures devised by Congress to effectuate the national policy of open housing pursuant to the Thirteenth and Fourteenth Amendments. Since the rights enforced in such cases were unknown at common law, and since the remedy involved is inherently equitable, section 812(c) is constitutional.

For the foregoing reason, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JACK GREENBERG

MICHAEL DAVIDSON

SYLVIA DREW

ERIC SCHNAPPER

10 Columbus Circle

New York, N.Y. 10019

PATRICIA D. McMAHON

Freedom Through Equality, Inc.

152 West Wisconsin Avenue

Milwaukee, Wisconsin 53203

SEYMOUR PIKOFKY

Milwaukee Legal Services

2200 North Third St.

Milwaukee, Wisconsin 53212

Attorneys for Petitioner

CHARLES L. BLACK, JR.

Of Counsel